SPEED POST

F. No. 373/42/SZ/DBK/2018-R.A.
F. No. 380/34/SZ/DBK/2020-R.A.
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 21/03/23

Order No. 104-105/23-Cus dated 20-03-2023 of the Government of India, passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India, under Section 129DD of the Customs Act, 1962.

SUBJECT : Revision Applications, filed under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal Nos. CMB-CEX-000-APP-021 dated 17.01.2018 & TCP-CUS-000-APP-016-020 dated 20.03.2020, passed by Commissioner of GST & Central Excise (Appeals), Coimbatore and the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli.

APPLICANT : 1. M/s EBEL Fashion Pvt. Ltd., Kolkata.

2. The Commissioner of Customs (Preventive), Tiruchirapalli.

RESPONDENT : 1. The Commissioner of Customs (Preventive), Tiruchirapalli.

2. M/s Lux Industries Ltd., Tirupur.

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ORDER

Revision Application, bearing No. 373/42/SZ/DBK/2018-R.A. dated 12.06.2018, has been filed by M/s EBEL Fashions Pvt. Ltd., Kolkata, formerly known as M/s EBEL Polymers Pvt. Ltd., (hereinafter referred to as the Private Party-1) against the Order-in-Appeal No. CMB-CEX-000-APP-021 dated 17.01.2018, passed by the Commissioner of GST & Central Excise (Appeals), Coimbatore. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal dated 17.01.2018, upheld the Order-in-Original No. 01/2017- ADC (CUS) dated 10.01.2017, passed by the Additional Commissioner of Customs, Coimbatore. The second Revision Application No. 380/34/SZ/DBK/2020-RA dated 07.08.2020 has been filed by the Commissioner of Customs (Preventive), Tiruchirapalli (hereinafter referred to as the Department) against the Order-in-Appeal No. TCP-CUS-000-APP-016-20 dated 20.03.2020, passed by the Commissioner of GST & Central Excise (Appeals), Tiruchirapalli. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal dated 20.03.2020, set aside the Order-in-Original No. TCP-CUS-PRV-JTC-108-18 dated 25.09.2018, passed by the Joint Commissioner of Customs, Tiruchirapalli in the case of M/s. Lux Industries Ltd., Tirupur (hereinafter referred to as the Private Party-2).

2.1 Briefly stated, Private Party-1 exported cotton knitted garments falling under Chapter 61 of the Customs Tariff, procured from Private Party-2, (who were the manufacturer of such goods), and exported these garments through ICD Concor, Veerapandi, Tirupur, under 07 shipping bills, during April 2011 to March 2012. The Private Party-1, as exporter, had declared in the shipping bills that no CENVAT facility had been availed on any of the inputs or inputs services used in the manufacture of the export products and received Rs. 12,93,833/- as drawback under Rule 3 of the Customs and Central Excise Duties and Service Tax Drawback Rules, 1995, at the higher rate (i.e. composite rate) of 7.5%/7.1% of the FOB value. Subsequently, during verification of the records of the Private Party-2, it was noticed that they as the manufactures of the subject goods had availed CENVAT credit on common input services such as domestic freights charges, security, telephone, professional charges, insurance, etc. and used it for payment of duty in respect of domestic clearances. The Private Party-2, thereafter, reversed the entire credit amount of Rs. 1,55,477/-, during October 2012, along with the applicable interest. However, as the Private Party-1, as exporter, had declared on the shipping bills that the manufacturer had not availed CENVAT facility on any of the input and inputs services used in the manufacture of export of goods, a show cause notice dated 03.05.2016 was issued to them bringing out that they were entitled to claim duty drawback only at the lower rate of 2.2% corresponding to the Customs component of the drawback, and, accordingly, they were required to show cause as to why excess duty drawback of Rs. 9,14,309/- should not be demanded and recovered from them, under

Rule 16 of the Drawback Rules, 1995 along with applicable interest. Penalty, under Sections 114 & 114AA of the Customs Act, 1962, was also sought to be imposed. The original authority, after following the principles of natural justice, confirmed the demand of Rs. 9,14,309/- and also imposed a penalty of Rs. 25,000/- on Private Party-1 under Section 114 and Section 114AA of the Customs Act, 1962. The appeal filed by the Private Party-1 herein has been rejected by the Commissioner (Appeals).

2.2 The Private Party-2 also directly exported 62 consignments of cotton knitted garments, during the period April 2011 to October 2012, and claimed drawback at higher rate (i.e. composite rate), totally amounting to Rs. 1,63,41,691/-. The Private party-2 declared on the relevant shipping bills that no CENVAT facility had been availed on any of the inputs or input services used in the manufacture of export products. Subsequently, upon being pointed out by the department, the Private Party-2 reversed the entire credit amount of Rs. 1,55,477/- during October 2012 along with interest. It was also noticed that they had not availed the credit on such services from May 2012 onwards. However, as mis-declaration had been made on the relevant shipping bills, a show cause notice dated 06.09.2016 was issued to the Private Party-2 seeking to demand and recover excess drawback of Rs. 1,14,41,316/-, under Rule 16 ibid along with the applicable interest. Penalty, under Section 114 and Section 114AA ibid, was also sought to be imposed. The original authority, vide aforesaid Order-in-Original dated 25.09.2018, confirmed the demand of excess drawback of Rs. 1,14,41,316/- along with applicable interest and also imposed penalties of Rs. 5,00,000/- each under Section 114 & 114AA, respectively. The appeal filed by the Private Party-2 has been allowed by the Commissioner (Appeals), vide the impugned Order-in-Appeal dated 20.03.2020.

3.1 The RA No. 373/42/SZ/DBK/2018-RA has been filed by the Private Party-1, mainly, on the grounds that the Private Party-1 is only a merchant exporter and was under bona fide belief that garments supplied by Private Party -2 had suffered duties and had claimed All Industry Rate (AIR) of drawback; that the manufacturer, i.e., Private Party-2 had inadvertently taken CENVAT credit of Rs. 1,55,477/- on common services which was subsequently reversed; that neither the export of goods nor eligibility for drawback is in dispute; that since the CENVAT credit wrongly availed had been reversed, there is no need for them to pay excess duty drawback with penalty.

3.2 The RA No. 380/34/SZ/DBK/2020-RA has been filed by the department, mainly, on the grounds that the Private Party-2 had misdeclared, at the time of export, that no CENVAT facility had been availed on any of the inputs or inputs services used in the manufacture of export products; that the exported materials were manufactured using taxable services in respect of which CENVAT credit had been availed and utilised; that it is only upon being pointed out by the department that the Private Party-2 paid back Rs.

1,55,477/- towards the credit taken and utilised; and that the Commissioner (Appeals) had failed to appreciate the correct import of the Board's Circular No. 858/16/2007-CX dated 08.01.2007 and other case laws cited by the Private Party-2 in support of its case.

4. RA No. 373/42/DBK/2018-RA has been filed with a delay, which is attributed to a bereavement in the family of the person handling the matter. Delay is condoned.

5. RA No. 373/42/SZ/DBK/2018-RA was listed for hearing on 28.12.2022, 09.01.2023, and 27.01.2023. In the hearing held in virtual mode, on 27.01.2023, Sh. S. Periasamy, Consultant appeared for the Private Party-1 and stated that in an identical matter involving the manufacturer in the case of exports made by Private Party-1, i.e., Private Party-2 department had filed RA No. 380/34/DBK/SZ/2020-RA against the order of Commissioner (Appeals). Therefore, in order to maintain uniformity, both the matters may be heard and decided together. Personal hearings in both the matters were thereafter fixed on 09.02.2023, 03.03.2023 and 15.03.2023. Sh. S. Periasamy, Consultant appeared for both the private parties in the hearing held, in virtual mode, on 15.03.2023. He requested that additional submissions dated 06.02.2023 may be taken on record. He reiterated the contents thereof. No one appeared for the department on any of the dates fixed for hearing nor any request for adjournment has been received. Therefore, it is presumed that the department has nothing to add in the matter.

6.1 The Government has carefully examined the matter. Undisputed facts of these cases are that the Private Party-2 was the manufacturer of the goods exported by itself as well as by Private Party-1 (as merchant exporter). The Private Party-2 had availed CENVAT credit on common input services used in the manufacture of goods exported but both the parties made a declaration on the relevant shipping bills that the CENVAT credit had not been availed in respect of the duties/tax paid on inputs and inputs services used in the manufacture of export products. Based on such declarations only, the AIR drawback at the composite rate was claimed and granted to them. It is only after the department verified the records of the Private Party-2 that the availment of CENVAT credit on the input services used in the manufacture of the export products came to notice and thereafter, upon being pointed out by the department, the CENVAT credit so availed was reversed in October 2012. The contention of the Private Party-1 and Private Party-2 is that the CENVAT credit was availed inadvertently which was reversed along with applicable interest and, therefore, in effect it amounts to not taking credit. Certain case laws including the judgments of the Hon'ble Supreme Court in the cases of Chandrapur Magnet Wires (P) Ltd. vs. Collector of Central Excise, Nagpur {1996 (81) ELT 3 (S.C.)} and Commissioner of Central Excise, Mumbai-I vs. Bombay Dyeing & Mfg. Co. Ltd. {2007 (215) ELT 3 (SC)}, have been relied upon to support this contention.

6.2 The Government observes that in the case of Chandrapur Magnet Wires (P) Ltd. (supra), the Hon'ble Supreme Court was seized of an issue of conditional exemption of manufactured goods, which was conditional upon CENVAT credit not being availed. The Hon'ble Supreme Court took note of a departmental circular which dealt with a case where manufacturer produces dutiable final products and also final products which are exempt from duty and which clarified that in such a case the manufacturer may take credit of duty paid on the common inputs used in the manufacture of final products provided that credit of duty paid on the inputs used in exempt products is debited in the credit account before the removal of such exempted final products. In this light, the Hon'ble Supreme Court held that if the credit is reversed before removal of the exempt final product, the exemption from payment of duty of central excise cannot be denied. In the present case, on the other hand, the CENVAT credit was reversed much after the clearance of export goods and that too at the instance of the department.

6.3 Similarly, in the case of Bombay Dyeing & Mfg. Co. Ltd. (supra), the Supreme Court allowed conditional exemption, which was conditional upon CENVAT credit not being availed, on the grounds that the credit availed was never utilized and was reversed before utilization. In the present case, it is not disputed that the credit availed had been fully utilized by March 2012 itself and there was no balance credit available in the CENVAT credit account in October 2012 when the same was pointed out by the department.

6.4.1 A decision of Hon'ble Supreme Court in the case of Commissioner of Central Excise & Customs vs. Precot Meridian Ltd. {2015 (325) ELT 234 (SC)} has also been cited. In a short judgment, the Hon'ble Supreme Court has in the Precot Meridian refused to interfere in that matter as the department had accepted the decisions in Franco Italian Co. Pvt. Ltd. vs. Commissioner {2000 (120) ELT 792 (Tri-LB)} and Hello Minerals Water (P) Ltd. vs {2004 (174) ELT 422 (All.)}

6.4.2 The Government observes that in the case of Franco Italian Co. Pvt. Ltd. (supra), a Larger Bench of CESTAT held as under:

> *"6. Drawing the similar analogy, we consider that subject to the reversal of the Modvat credit taken with regard to the inputs which were utilized for the manufacture of duty free goods, the manufacturer could avail of the Modavt credit as well as the full duty exemption under the applicable small scale exemption Notification with regard to the same specified goods. The reference is answered accordingly."*

6.4.3 In the case of Hello Minerals Water (P) Ltd. (supra), the Hon'ble Allahabad High Court was seized of a case where benefit of notification no. 15/94-CE dated 01.03.1994,

which was conditional upon non availment of MODVAT credit on inputs, had been availed. Following extracts from the Order of Hon'ble High Court are relevant:

> ***"19.*** *The Tribunal while passing the impugned order dated 1-10-2003 [2004 (163) E.L.T. 55 (Tri. - Del.)] has not referred to the larger Bench decision of the Tribunal and other binding decisions. In Chandrapur Magnet Wire Limited v. Collector Central Excise, 1996 (81) E.L.T. 3 the Supreme Court has held :-*
>
> *"If debit entry is permissible to be made, the credit entry for duties paid on the inputs utilised in manufacture of final exempted product will stand deleted in the account of the assessee. In such a situation it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of final exempted product under Rule 57-A. In other words the claim of exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of duty paid on the inputs used in manufacture of these goods."*
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> ***20.*** *The Tribunal while passing the impugned order dated 1-10-2003 instead of following the principles of law and the ratio of the decision of the Supreme Court in Chandrapur Magnet Wires Ltd. (supra) and also the decision of the larger five Members Bench of the Tribunal in the case of Franco Italian Company (P) Limited (supra) and other larger bench decision in the case of ICON Pharma and Surgical (P) Ltd. - 2000 (40) RLT 918 has held that reversal on inputs credit should have been done before removal of the bottles. In our opinion the Tribunal has completely misunderstood the decision in the case of Chandrapur Magnet Wires Ltd. (supra) in which the Supreme Court has quoted the Circular issued by the Ministry of Finance, being Circular No. 22/8/86, dated 10-4-1986. In Para 5 of the said Circular it was mentioned that the duty paid in the inputs used should be debited, before removal of such exempted final products. Since the Circular in that case required reversal of the credit before removal of the final product, hence the Supreme Court interpreting the said circular has mentioned that they see no reason why the assessee cannot make debit entry before removal of exempted final products.*
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> ***21.*** *In the present case for the purposes of claiming the benefit of the Notification No. 15/94-C.E., dated 1-3-1994 neither any circular has been issued nor the said circular of 1986 has been made applicable in the notification, which has been issued in 1994.*
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> ***22.*** *Hence in our opinion the Tribunal was not justified in taking a view that reversal of the credit having been made by the petitioner after removal of the final products the petitioner was not entitled to the benefit of Notification No. 15/94-C.E., dated 1-3-1994."*

Thus, the Hon'ble High Court held that the condition of reversal before the removal from factory was laid down by the Apex Court, in Chandrapur Magnet Wires Ltd, in view of the departmental circular dated 10.04.1986 and since in respect of notification no. 15/94-CE dated 01.03.1994, neither any circular had been issued nor the earlier circular had been made applicable, the assesse was entitled to the benefit even if the credit had been reversed subsequent to removal of exempted products from the factory.

6.4.4 It evident that neither in the case of Franco Italian nor in the case of Hello Minerals, it was decided that subsequent payment/reversal would amount to non-availment even where credit availed had not only been reversed/paid back after removal of goods but also after it had been fully utilized.

6.4.5 Further, as already brought out, the view taken by the Hon'ble High Court in Hello Minerals is guided by the fact that neither the Circular dated 10.04.1986 had been made applicable nor any other Circular had been issued. In the present case, on the other hand, the lower authority has relied upon Board's Circular No. 858/16/2007-CX dated 08.11.2007. In the aforesaid Circular, the Board had, in pursuance of the judgment in Bombay Dyeing (supra), clarified that, in case, the credit taken on inputs used in manufacture of goods falling under Ch. 50 to 63 CETA, 1985 and cleared under notification no. 14/2002-CE or notification no. 30/2004-CE "has been reversed before utilization, it would amount to credit not having been taken."

7. While on this issue, it is also to be noted that the appeal filed by the Private Party-2 has been allowed by the Commissioner (Appeals), inter-alia, on the following grounds:

> *"17. ----------the appellant has never availed credit on inputs but had inadvertently availed on some common input services, which was also subsequently reversed with interest."*

In the present case, it is on record that from May 2012 onwards Private Party-2 had stopped availing CENVAT credit on the common input services and, therefore, it is apparent that at least in May 2012, the Private Party-2 had become aware that they should not be availing such credit since they were exporting goods at a claim of higher rate of drawback. Despite the same they reversed the credit already availed only in October 2012, i.e., after being pointed out by the department. Therefore, it is apparent that credit was availed consciously and the mis-declaration made on the shipping bills was willful. As such, the findings of Commissioner (Appeals) that the credit had been availed inadvertently cannot be sustained.

8. Before concluding the matter, an issue of proprietary also needs to be observed. In the case of Private Party-1 (RA No. 373/42/SZ/DBK/2018-RA), the then Additional Commissioner of Customs, Coimbatore, as original authority, had confirmed the demand

of excess drawback paid on the grounds that Private Party-2 had availed CENVAT credit on the common input services used in the manufacture of exported products. However, in the case of exports made by the Private Party-2 itself, the same officer in his capacity as Commissioner (Appeals) has set aside the order of his successor while facts of the case and the averments made were identical. Suffice it to say, for sake of proprietary, the Commissioner (Appeals) having decided the case of Private Party-1, in his capacity as Additional Commissioner, which arose due to availment of self same CENVAT credit by the Private Party-2, ought not to have decided the appeal of Private Party-2. The Order dated 20.03.2020 of the Commissioner (Appeals) cannot be sustained for this reason as well.

9. In view of the above, the RA No. 373/42/DBK/SZ/2018-RA filed by the Private Party-1 is rejected and the RA No. 380/34/DBK/2021-RA filed by the department is allowed. Consequently, impugned Order-in-Appeal dated 17.01.2018 is upheld and the impugned Order-in-Appeal dated 20.03.2020 is set aside.

(Sandeep Prakash)
Additional Secretary to the Government of India

1. M/s EBEL Fashion Pvt. Ltd.,
(Formerly known as M/s. EBEL Polymers Pvt. Ltd.),
PS Srijan Tech-Park, 10th Floor, DN-52,
Sector-V, Salt Lake, Kolkata-700091.

2. The Commissioner of Customs (Preventive),
No. 1, Williams Road, Cantonment,
Tiruchirapalli-620001.

Order No. 104-105/23-Cus dated 20-03-2023

Copy to:-

1. M/s. Lux Industries Limited, 473/181, Avinashalingapalayam, Palangarai village, Avinashi, Tirupur-641654.
2. The Commissioner of GST & Central Excise (Appeals), 6/7 A.T.D. Street, Race Course Road, Coimbatore-641018.
3. The Commissioner of Customs & Central Excise (Appeals,), No. 1, William Road, Cantonment, Tiruchirapalli-620001.

4. Sh. S. Periasamy, Consultant, BMK Building, III Floor, Sabari Salai, Kumaran Road, Tirpur-641601.
5. PPS to A.S (RA)
6. Guard File
7. Spare Copy
8. Notice Board

21/03/2023

ATTESTED
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