SPEED POST

F. No. 373/347/DBK/SZ/2018-R.A.
F. No. 373/302/DBK/SZ/2019-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. 109-110 / 23-Cus dated 21-03-2023 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. 194/2018-TTN(CUS) dated 06.09.2018 & 47/2019-TRY (CUS) dated 26.04.2019, passed by the Commissioner of Customs & Central Excise(Appeals), Tiruchirapalli.

APPLICANT : M/s Rupa & Co. Limited, Tirupur.

RESPONDENT : 1. The Commissioner of Customs, Tuticorin.

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

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ORDER

Two Revision Applications, bearing No. 373/347/DBK/SZ/2018-R.A. dated 06.12.2018 & No. 373/302/DBK/SZ/2019-RA dated 29.07.2019, have been filed by M/s Rupa & Co. Ltd., Tirupur (hereinafter referred to as the Applicant) against the Orders-in-Appeal No. 194/2018-TTN(CUS) dated 06.09.2018 & No. 47/2019-TRY (CUS) dated 26.04.2019, passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli. The Commissioner (Appeals) has, vide the impugned Orders-in-Appeal, upheld the Orders-in-Original No. 14/2018 dated 29.03.2018 & No. TCP-CUS-PRV-JTC-020-18 dated 28.09.2018, respectively, passed by the Additional Commissioner of Customs, Tuticorin and Joint Commissioner of Customs, Trichy, respectively.

2.1 The Applicants herein are manufacturers of hosiery garments and exported a part of their manufactured products to various countries under duty drawback scheme, during the period March 2011 to February 2013. Intelligence gathered by the Customs Intelligence Unit revealed that the Applicants had availed CENVAT credit on inputs and input services during the said period and utilised the same for payment of Central Excise duty. The Applicants had, at the same time, claimed higher rate of duty drawback on the exported products while, simultaneously, declaring in the shipping bills that they had not availed CENVAT credit. Accordingly, excess drawback of Rs. 39,13,490/-appeared to have been paid to them against export of 29 consignments of cotton knitted garments, falling under Chapter 61, through ICD, Tuticorin, with total FOB value of Rs. 8,60,08,886/-. Accordingly, a show cause notice dated 14.03.2017 was issued to the Applicants requiring them to show cause as to why ineligible drawback of Rs. 39,13,490/ should not be demanded and recovered from them under Rule 16 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 with applicable interest. Penal provisions under Sections 114 & 114AA were also invoked. The original authority, vide the aforesaid Order-in-Original dated 29.03.2018, confirmed the demand of the ineligible drawback along with applicable interest and imposed penalties of Rs. 40,00,000/- and Rs. 5,00,000/- on the Applicants under Sections 114 & 114AA, respectively. Commissioner (Appeals) has, vide impugned Order-in-Appeal dated 06.09.2018, rejected the appeal, except to the extent of reducing the penalties imposed under Sections 114 & 114AA to Rs. 4,00,000/- and Rs. 1,00,000/- respectively.

2.2 The Applicants also exported manufactured branded garments, from ICD, Rakkiyapalayam/ Chettipalayam/Tirupur/Coimbatore, with a total FOB value of Rs. 4,56,76,100/- and claimed Rs. 33,17,463/- as duty drawback thereon, during the period of July 2011 to May 2012. In this case also, it was found that the goods exported had been manufactured after availing CENVAT credit but higher rate of drawback meant for goods exported, when no CENVAT credit had been availed, was claimed. Accordingly, a show cause notice dated 21.03.2017 was issued to the Applicants requiring them to show cause notice as to why excess duty drawback of Rs. 23,12,589/- should not be demanded and recovered from them under Rule 16 ibid along with applicable interest. Penalties under Sections 114 & 114AA were also sought to be imposed. The original authority, vide the aforesaid Order-in-Original dated 28.09.2018, confirmed the demand of excess drawback of Rs. 23,12,589/- and imposed penalty of Rs. 50,000/- under Sections 114 & 114AA on

the Applicants herein. The appeal filed by the Applicants herein has been rejected by the Commissioner (Appeals), vide the impugned Order-in-Appeal dated 26.04.2019.

3. The revision applications have been filed on common grounds, mainly, contending that, during the relevant period, drawback @ of 7.5%/7.1%/7.9% on FOB value was available when CENVAT facility had not been availed whereas it was available at the *reduced* rate of 4%/2.2% of the FOB value when CENVAT facility had been availed; that they had availed CENVAT credit on inputs such as packing materials, labels and elastics and inputs services such as telephone, advertisement, audit services and sample lab testing; that they had been maintaining separate inventory for materials used for manufacture of final products which were exported and no CENVAT of excise duty paid had been availed in respect of inputs; that the advertisement services were meant for promoting products in domestic market whereas the CENVAT credit availed on inputs services such as telephone, audit, samples testing and courier had been availed inadvertently which was reversed along with interest; that as they had reversed the credit availed on common input services they were eligible for drawback at higher rate since reversal of credit amounts to non-availment of credit; that penalty under Section 114 is not imposable as the goods were not available for confiscation; and that penalty under Section 114AA was also not imposable as they had not made any mis-declaratoin knowingly or intentionally.

4. Personal hearings in the matter were fixed on 13.03.2023 and 20.03.2023. In the hearing held, in virtual mode, on 20.03.2023. Sh. M. Karthikeyan, Advocate appeared for the Applicants and reiterated the contents of the RAs. He highlighted that small amount of CENVAT credit availed had been reversed. The reversal of credit, even though initially utilised, amounts to non availment in view of case laws cited. No one appeared for the department nor any request for adjournment has been received. Hence, it is presumed that the department has nothing to add in the matter.

5.1 The Government has carefully examined the matter. Undisputed facts of these cases are that the Applicants had availed CENVAT credit on common input services used in the manufacture of goods exported but 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 initiated the investigations that the CENVAT credit so availed was reversed. The contention of the Applicants 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 judgment of the Hon'ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. vs. Collector of Central Excise, Nagpur {1996 (81) ELT 3 (S.C.)}, have been relied upon to support this contention.

5.2 At the outset, the Government observes that the CENVAT credit was availed on several common input services, including insurance services. It has been pointed out by the lower authority in the Order-in-Original dated 29.03.2018 that the Applicants herein

have not indicated reversal of credit availed in respect of one of these services, i.e., insurance services. This position has not been controverted even at this stage. Therefore, it is apparent that only a part of the CENVAT credit availed has been reversed. As such, the claim of the Applicants that entire credit has been reversed is factually incorrect. Consequently, the legal argument based thereon, i.e., since credit has been reversed, it amounts to non-availment, cannot also be countenanced.

5.3 Even otherwise, the case laws relied upon by the Applicants are not applicable in the facts of this case. 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.

5.4 The Commissioner (Appeals) has relied upon the judgment of the Hon'ble Supreme Court in the case of Bombay Dyeing & Mfg. Co. Ltd. {2007 (215) 3ELT (SC)}. In this case, 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 already been utilized and the reversal thereof is subsequent to such utilization.

5.5.1 A decision of Hon'ble Allahabad High Court in the case of Hello Minerals Water (P) Ltd. vs {2004 (174) ELT 422 (All.)} has been heavily relied upon by the Applicants.

5.5.2 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 :-*
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> *"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."

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.*

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.*

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. This case is, therefore, not an authority to contend that 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.

5.5.3 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, the goods exported were at the relevant time exempted from payment of central excise duty, subject to non-availment of CENVAT credit on inputs, in terms of notification no. 30/2004-CE dated 09.07.2004. In this respect, the Board had, vide Circular No. 845/03/2006-CX dated 01.02.2007 clarified that reversal of credit at a later date would not suffice to make the manufacturers eligible for this exemption. However, subsequently, taking cognizance of the Apex Court's decision in Bombay Dyeing (supra), the Board, vide Circular No. 858/16/2007-CX dated 08.11.2007, clarified that, in case, the credit taken on inputs used

in manufacture of goods falling under Ch. 50 to 63 CETA, 1985 "has been reversed before utilization, it would amount to credit not having been taken." Thus, in respect of the subject goods, there is a clarification that requires reversal of credit before utilization.

5.6 A decision of Hon'ble Rajasthan High Court, in the case of Commissioner of Central Excise, Jaipur-I vs. Sanjay Engineering Industries {2016 (43) STR 354 (Raj.)}, has also been relied upon by the Applicants. It is observed that this case has been decided by the Hon'ble Rajasthan High Court by following the judgment in Hello Minerals (supra). As already brought out hereinabove, the judgment in Hello Minerals does not support the case of the Applicants. Therefore, Sanjay Engineering Industries can also not come to the rescue of their case.

6.1 It has been contended that the credit had been availed on common input services inadvertently in so far as it related to such services being used in the manufacture of exported products. However, the Government is not persuaded to accept this contention of the Applicants in as much as, simultaneously, they have claimed that as far as inputs are concerned they had maintained separate accounts and had not availed the CENVAT credit thereby confirming that they were fully aware of requirement of not availing CENVAT credit in respect of the goods exported where higher rate of drawback had been claimed. In such a scenario, the availment of CENVAT credit on common input services can only be treated as a conscious act and, consequently, mis-declaration on the shipping bills is to be hold as wilful. Further, as pointed out by the original authority, while the CENVAT credit in respect of telephone, advertisement, audit, courier and samples lab testing was reversed, there is no indication of reversal in respect of the CENVAT credit availed on the insurance services. Therefore, the penalty imposed under Section 114AA cannot be assailed.

6.2 The original authority has specifically held that the goods were liable to confiscation under Section 113. In such a case, the penalty under Section 114 has also been correctly imposed.

7. In view of the above, the Orders-in-Appeal impugned herein do not merit revision and the revision applications are rejected.

(Sandeep Prakash)
Additional Secretary to the Government of India

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Order No. 109-110/23-Cus dated 21-03-2023

Copy to:-

1. The Commissioner of Customs, Custom House, New Harbour Estate, Tuticorin-628004.
2. The Commissioner of Customs (Preventive), No. 1, Williams Road, Cantonment, Tiruchirapalli-620001.
3. The Commissioner of Customs & Central Excise (Appeals), No. 1, William Road, Cantonment, Tiruchirapalli-620001.
4. M/s. Swamy Associates, 18, Rams flats, Ashoka Avenue, Directors Colony, Kodambakkam, Chennai-600024.
5. PPS to AS (RA)
6. Guard File
7. Spare Copy
8. Notice Board

ATTESTED

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