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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
38,MG Marg Civil Lines,Old Red Building,Allahabad-211001
Regional Branch, Allahabad

Dated: 09/08/2017

To

Appellant as per address in table below
Respondent as per address in table below

Final Order No. A/70741/2017-SM[BR] dated 14/07/2017

I am directed to transmit herewith a certified copy of order passed by the Tribunal under section 35-C(1) of the **Central Excise and Salt Act, 1944.**

Asstt. Registrar

	Application	Appeal	Name and Address of Appellant
1	E/CROSS/88/2009	E/490/2009	CCE, KANPUR 117/7, Sarvodaya Nagar, Kanpur 208005.
			Name and Address of Respondent
2			SABHARWALS MEDICALS PVT. LTD. BHAWANIPUR MANDHANA, KANPUR DEHAT.,,

Copy To):

3 Bar Association, CESTAT, Allahabad

4 Director Publications, Customs, Excise. I.P. Estate, Delhi

5 M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, New Delhi-3

6 Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

7 Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

8 LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

9 TaxIndiaOnline.com Pvt. Ltd., 2nd Floor, Vasant Arcade, Vasant Kunj, New Delhi - 110070

10 Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Hyderabad – 38

11 The ICFAI society, 52, Nagarjuna Hill,Punjagutta Hyderabad.-500082

12 M/S Knowledge Processing Pvt. ltd.(taxmanagementindia.com),FF-19,1st Floor,Cross River Mall,CBD Ground,Near Karkardooma Court,Delhi-110032

13 C.D.R. 14 Office Copy 15 Guard File

Asstt. Registrar

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

REGIONAL BENCH : ALLAHABAD
COURT No. I
E/CROSS/88/2009
APPEAL No.E/490/2009-EX[SM]

(Arising out of Order-in-Appeal No. 428-429-CEX/APPL/KNP/2008 dated 21/11/2008 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur)

Commissioner of Central Excise, Kanpur — **Appellant**

Vs.

M/s Sabharwals Medicals Pvt. Ltd. — **Respondent**

Appearance:

Shri Pawan Kumar Singh, Supdt (AR), for Appellant
for Respondent

CORAM:

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 14/07/2017
Date of Decision : 14/07/2017

FINAL ORDER NO.-70741/2017.........

Per: Anil G. Shakkarwar

The present appeal is directed against Order-in-Appeal No. 428-429-CEX/APPL/KNP/2008 dated 21/11/2008 passed by Commissioner of Central Excise & Customs (Appeals), Kanpur.

2. The brief facts of the case are that the respondent had filed two refund claims of Rs.1,19,799/- and Rs.6,275/- in respect of inputs used in manufacture of their final products falling under Chapter Heading No.3005 of schedule to Central

Excise Tariff Act, 1985, exported under bond, on the ground that they were not in a position to utilize Cenvat credit of the duty paid on inputs, under Rule-5 of the Cenvat Credit Rules, 2004. The appellant were also availing SSI exemption under Notification No.08/2003-CE dated 01.03.2008 as amended. The refund claim was rejected on the ground that- "As per proviso to Rule-5 of the Cenvat Credit Rules, 2004, the refund of credit was not available to the manufacturer, if the drawback allowed under the Customs and Central Excise Duty Drawback Rules, 1995 or claim or rebate of duty under the Central Excise Rules, 2002 in respect of such duty, as the case may be, has been availed and it was observed that the appellant has filed the shipping bills for the export of goods under claim for duty drawback and/or under DEPB scheme" through the Order-in-Original dated 04.09.2008. Respondent preferred appeal before Commissioner (Appeals), which was decided through the impugned Order-in-Appeal dated 21.11.2008, wherein the learned Commissioner (Appeals) has held that respondent had availed duty drawback in respect of Customs duty and in the Budget Instructions pronounced for the year 2007-08 and placed at Page 1.32 of the Tariff 2007-08, 44th edition (R.K. Jain), it has been mentioned under the heading "Refund (Rule-5) of Credit" that "However there is no objection to simultaneous availment of all industries rate of drawback in relation to Customs portion of duty". The learned Commissioner (Appeals) have held that since the appellant had availed only Customs portion of drawback, they were eligible for refund of Cenvat credit on the Central Excise duty paid and service tax paid on the inputs and input services. Therefore, learned Commissioner (Appeals) through the impugned Order-in-Appeal set aside the said Order-in-Original dated 04.09.2008 and allowed the appeal. Aggrieved by the said order, Revenue is in appeal, before this Tribunal.

3. The main ground of revenue is that when the said Rule-5 which has allowed refund of unutilized Cenvat credit itself stipulates that no refund of unutilized Cenvat credit will be allowed if the drawback under the Customs and Central Excise Duty drawback Rules, 1995 have been allowed, it was not proper for the learned Commissioner (Appeals) to coclude that such refund could still allowed if only drawback of Customs portions has been availed.

4. Heard the parties.

5. Having considered the rival submissions and on perusal of records, I find that learned Commissioner (Appeals) has held that there is no restriction on refund of Cenvat credit under Rule-5 of Cenvat Credit Rules, 2004 in respect of Cenvat credit of Central Excise duty paid on inputs and service tax paid on the input services, even if the Customs component of drawback is paid on the goods exported. In support of said findings I find Rule-3 of the Customs, Central

Excise Duties and Service Tax Drawback Rules, 1995, which reads as follows:-

"**RULE 3. Drawback.** - (1) Subject to the provisions of -

(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder,

(b) the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder, [x x x]

[(bb) the Finance Act, 1994 (32 of 1994), and the rules made thereunder; and]

(c) these rules,

a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government :
[**Provided** that where any goods are produced or manufactured from imported materials or excisable materials or by using any taxable services as input services, on some of which only the duty or tax chargeable thereon has been paid and not on the rest, or only a part of the duty or tax chargeable has been paid; or the duty or tax paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, or of the Finance Act, 1994 (32 of 1994) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty or tax paid or the rebate, refund or credit obtained :]"

On plain reading of said Rule-3 reproduced hereinabove, it is clear that the availment of Cenvat credit will prevail over disbursement of drawback. Therefore, on the ground that drawback of Customs duty has been paid to the respondent, refund of Cenvat credit of Central Excise duty paid on inputs and service tax paid on input service under said Rule-5 cannot be denied. Therefore, I do not find any merits, in the appeal filed by Revenue and the same is dismissed. Respondent-assessee shall be entitled for consequential relief, in accordance with law. Cross Objection also stands disposed of.

(Dictated in Court)

-Sd/-
(ANIL G. SHAKKARWAR)
Member(TECHNICAL)

akp

प्रमाणित प्रति/Certified True Copy
14/08/17
सहायक पंजीकार/Asstt. Registrar
सीमाशुल्क, उत्पादशुल्क एवं सेवा कर
अपील अधिकरण/(C.E.S.T.A.T.)
38, एम. जी. मार्ग, इलाहाबाद-211001
38, M. G. MARG, ALLAHABAD-211001