

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. E / 3 - 6 /2010 – SM[BR]

Date 16/11/2011

Assistant Registrar
C.E.S.T.A.T, New Delhi

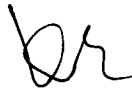
To :
ELCOMPONICS SALES PVT LTD
A-120, SECTOR-63, NOIDA.
ELCOMPONICS SALES PVT LTD

Appellant
Vs
Respondent

dated 13.10.2011

C.C.E. NOIDA

I am directed to transmit herewith a certified copy of **Final order No. 778 – 781 /2011-SM[BR]**
passed by the Tribunal under **Section 35-C(1)of Central Excises Act, 1944**


Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
C.C.E. NOIDA
C-56/42, SECTOR-62,
NOIDA-201307

2. Adv. / Consult
MR.PRABHAT KUMAR

B-51(BASEMENT)SARVODAYA ENCLAVE NEAR MOTHER INTERNATIONAL
SCHOOL NEW DELHI

3. C.D.R

4. Bar association, CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New

6. M/s Centax Publications Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -

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

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

9. Easy Service Tax Online Dot Com Pvt.Ltd.407A, Iscon Mall, Above Star India Bazar, Satellite Road,
Ahmedabad-15

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

11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor, Vasant Arcade, Nelson Mandela Road,
Vasant Kunj, New Delhi - 110070

12. Office Copy

13. Guard file

2. **ELCOMPONICS SALES PVT LTD**
A-120, SECTOR 63, NOIDA

3. **ELCOMPONICS SALES PVT LTD**
A-120, SECTOR 63, NOIDA

4. **ELCOMPONICS SALES PVT LTD**
A-120, SECTOR-63, NOIDA


Assistant Registrar
(SM Appeal Branch)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

Date of Hearing:13.10.2011
Date of Decision:13.10.2011.

Excise Appeals Nos.03-06 of 2010-SM

(Arising out of common Order-in-Appeal No.282-285 dated 30.9.2009
passed by the Commissioner of Central Excise (Appeals), Noida)

For Approval and signature:

Hon'ble Shri Rakesh Kumar, Member (Technical)

-
1. Whether Press Reporters may be allowed to see
The order for publication as per Rule 27 of the
CESTAT(Procedure) Rules, 1982?
 2. Whether it would be released under Rule 27 of
the cESTAT (Procedure) rules, 1982 for
publication in any authoritative report or not?
 3. Whether their lordships wish to see the fair
copy of the order?
 4. Whether order is to be circulated to the
Department Authorities?
-

M/s. Elcomponics Sales Pvt.Ltd.

Appellants

Vs

CCE, Noida

Respondent

Appeared for the Appellant: Rep. by Shri Prabhat Kumar, Advocate

Appeared for the Respondent: Rep. by Mrs. R. Jagdev, SDR

Coram: Hon'ble Shri Rakesh Kumar, Member (Technical)

Final ORDER...778-781/2011 *SM(Br)* Dated: 13.10.2011

Per Rakesh Kumar:

The appellants are a 100% Export Oriented Unit engaged in the manufacture of Connectors and Connector assembly for export. They availed cenvat credit of central excise duty paid on inputs and service tax paid on services used in or in relation to the manufacture of their final products. The appellants have physical exports out of India and also deemed export i.e. supplies to other 100% EOUs. Since the appellant could not utilize the cenvat credit availed by them for payment of duty on the goods cleared to DTA, as they had no DTA clearances, they applied for cash refund from time to time of the accumulated cenvat credit in terms of provisions of Rule 5 of the Cenvat Credit Rules, 2004 read with Notification No.5/2006-Customs dated 14.03.2006. The refund claims were being filed on quarterly basis. The dispute is in respect of refund claims for the periods Jan., 2006 to March, 2006, July, 2006 to September, 2006, November, 2005 to December, 2005 and April, 2006 to June, 2006. The refund claims for these periods were disallowed to the extent of the cenvat credit which was in respect of the supplies of the final products to 100% EOU, as according to the department, the supplies to 100% EOUs are only deemed *ex/b* in respect of which

the provisions of Rule 5 of the Cenvat Credit Rules are not applicable and that the provisions of this Rule are applicable only in respect of physical exports. On this basis, the refund claims of Rs.2,72,275/-, Rs.2,47,706/- Rs.2,34,057/- and Rs.1,23,846/- in respect of the period from Jan, 2006 to March, 2006, July, 2006 to September, 2006, October, 2005 to December, 2005 and April to June, 2006 respectively were rejected by the Asstt. Commissioner. On appeal to the Commissioner (Appeals), these orders of the original adjudicating authority were upheld. Against this order of the Commissioner (Appeals), these four appeals have been filed.

2. Heard both the sides.

3. Shri Prabhat Kumar, Advocate, Id. Counsel for the appellant, pleaded that the main issue in this case is as to whether the provisions of Rule 5 of the Cenvat Credit Rules, 2004 are applicable in respect of the clearances made by a manufacturer to 100% EOU without payment of duty, that this issue stands decided in favour of the appellant by the judgements of-(a) Hon'ble Gujarat High Court in the case of **CCE, Surat Vs. Shilpa Copper Wire Industries** reported in 2011 (269) ELT-17 (Gujarat), (b) **Tribunal's judgement in the case of CCE, Surat Vs. Shilpa Copper Wire Industries** reported in 2008 (226) ELT 228 (Tribunal-Ahmd.), which was upheld by the Hon'ble Gujarat High Court vide judgement

reported in 2010 (258) ELT A20, (c) Tribunal's judgement in the case of **Cauvery Stones Impex Private Ltd. Vs. CCE, Salem** reported in 2010 (257) ELT 151 (Tribunal-Chennai), (d) **NBM Industries Vs. CCE, Rajkot** reported in 2009 (246) ELT 252 (Tribunal-Ahmd.), ^{and (e)} **Neo Foods Pvt. Ltd. Vs. CCE, Bangalore** reported in 2009 (242) ELT 562 (Tribunal-Ban.), that in all these judgements, the view of the High Court and the Tribunal was that ^{clearances to 100% EOU} ~~supplies~~ are of intermediate products used in the manufacture of goods cleared for export ^{which are also to be treated as exports,} that in view of the settled legal position, on this issue, the impugned order disallowing the cash refund of the accumulated cenvat credit in respect of the supplies to the 100 % EOU is not correct, that in the Appeal No.E/6/2010, the issue of limitation has also been raised, that the limitation period under Section 11 B is not applicable to the cash refund under Rule 5 of the Cenvat Credit Rules and in this regard, he relies upon the judgement of the Hon'ble Gujarat High Court in the case of **CCE, Surat-I Vs. Swagat Synthetics** reported in 2008 (232) ELT, ^{wherein} it was held that the limitation period prescribed under Section 11 B is not applicable for cash refund claim of the accumulated Cenvat Credit under Rule 57F of the Central Excise Rules, 1944, which corresponds to Rule 5 of the present Cenvat Credit Rules, 2004, that same view has been taken by the Tribunal in the case of **Global Energy Food Indus. Vs. CCE, Ahmedabad**

reported in 2010 (262) ELT 627, and that in view of this, the impugned order upholding the denial of refund claims is not correct.

4. Mrs. R. Jagdev, the ld. Senior Departmental Representative, defended the impugned order by reiterating the findings of the Commissioner (Appeals) in it and pleaded that from the language of Rule 5 of the Cenvat Credit Rules, 2004, it is clear that it provides for cash refund of cenvat credit accumulated on account of physical exports, that supplies to 100% EOU are only deemed exports to which the provisions of Rule 5 are not applicable, that as per the provisions of para 8.3 of the Foreign Trade Policy, 2004, a person in respect of deemed export is eligible for only three benefits – advance authorization, deemed export draw back and exemption from terminal excise duty, that in view of the provisions of Exim Policy, the appellant cannot claim the additional benefit of cash refund of the accumulated cenvat credit, which is not mentioned in para 8.3 of the Exim Policy, 2004-2009, that one of the refund claims for the period from October, 2005 to December, 2005 is time barred as the claim filed after expiry of the limitation period under Section 11 B and that in view of this, there is no infirmity in the impugned order.

5. I have carefully considered the submissions from both the sides and perused the records. First and the main point of dispute in this case is as to

whether the provisions of Rule 5 of the Cenvat Credit Rules, 2004 are applicable in respect of supplies by a manufacturer without payment of duty to ~~a~~ 100% EOU, ~~On~~ ^a this point, I find that there are [✓] series of judgements of Hon'ble Gujarat High Court and of the Tribunal, which are in favour of the appellant – (a) **Hon'ble Gujarat High Court' judgement in the case of CCE Vs. Shilpa Copper Wire Industries reported in 2011 (269) ELT 17 (Gujarat) and also 2010 (258) ELT A20 and the Tribunal's judgements in the cases of Western Cans P. Ltd. reported in 2011 (270) ELT 101 (Tribunal-Mumbai) and NBM Industries Vs. CCE reported in 2009 (246) ELT 252 (Tribunal-Ahmd.).** In all these judgements, it has been held that when the finished goods manufactured out of cenvat credit availed inputs have been supplied to 100% EOUs, refund of accumulated cenvat credit under Rule 5 cannot be denied on the ground that the supplies to 100% EOU are deemed export and not real exports [✓] as Rule 5 of the Cenvat Credit Rules also provides for the refund of cenvat credit on the goods which are cleared as intermediate products ^{for} in manufacture of final products [?] for export and supplies to 100% EOU have to be treated as clearances for export. Hon'ble Gujarat High Court in another judgement in cae of **CCE Vs. NBM Industries reported in 2011 TIOL 677-HC-AHM (CX)** has reiterated its earlier view that refund under Rule 5 of Cenvat Credit Rules,

2004 can not be denied on the ground that deemed exports are not physical exports. In view of settled legal position on this issue, I hold that the provisions of Rule 5 of the Cenvat Credit Rules would be applicable even in respect of supplies made without payment of duty to 100% EOUs and the cash refund of the accumulated cenvat credit in respect of such supplies cannot be denied.

6. As regards the second issue regarding the refund claim being time barred in terms ~~of the~~ the limitation period prescribed under Section 11 B, raised in respect of the refund claim for the period from November, 2005 to December, 2005, this issue also stands decided in favour of the appellant in the cases of **Global Energy Food Indus. Vs. CCE, Ahmedabad (supra)** and also the judgement of the Gujarat High Court in the case of **CCE, Surat-I Vs. Swagat Synthetics (supra)**, wherein it has been held that time limit stipulated under Section 11 B of the Central Excise Act is not applicable in the case of refund claim under Rule 5 of the Cenvat Credit Rules, 2004.

7. As regards, the third plea of the Id. Departmental Representative that in terms of para 8.3 of the Exim Policy 2004-2009 ~~in~~ in respect of deemed ^{exports only} ~~exports~~ three benefits viz. (i) Advance Authorization, (ii) Deemed Export Drawback, and (iii) Exemption from terminal excise

an admissible
 duty and that view of this, *would not be admissible*, the cash refund of the
 accumulated cenvat credit. I am of the view that this plea is not correct, as

this provision of the Exim Policy cannot be read into the provisions of the
 Cenvat Credit Rules, when Rule 5 of the Cenvat Credit Rules ~~valid~~ provides
 for cash refund of the accumulated cenvat credit in respect of the final
 products cleared for export under bond or the intermediate product ^{*cleared*} for
 export and this provision has been interpreted by a series of the judgements
 of the Tribunal and of the High Court, that the same would be applicable in
 respect of clearance to 100% EOUs also.

8. In view of the above discussion, the impugned order is not correct.
 The same is set aside. The appeals are allowed.

[order dictated & pronounced in open court]

(Rakesh Kumar)
 Member (Technical)

Ckp.