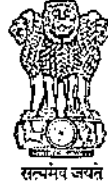


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**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

**Office of the Principal Commissioner RA and  
Ex-Officio Additional Secretary to the Government of India**

8<sup>th</sup> Floor, World Trade Centre, Cuffe Parade,  
Mumbai- 400 005

F. No. 380/77/DBK/14-RA/50

Date of Issue: 22/02/20

ORDER NO. 02/2020-CUS(WZ) /ASRA/MUMBAI DATED 31.01.2020 OF THE  
GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL  
COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE  
GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT,  
1962.

Applicant : Commissioner of Customs  
Custom House,  
Kandla

Respondent : M/s Cargill India Pvt. Ltd.  
14<sup>th</sup> Floor, Building No. 9A,  
DLF Cyber City, Phase-III,  
Gurgaon - 122 002  
Haryana

Subject : Revision Applications filed under Section 129DD of the Customs Act,  
1962 against OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014  
dated 10.03.2014 passed by the Commissioner of Customs(Appeals),  
Kandla.

**ORDER**

These revision applications have been filed by the Commissioner of Customs, Kandla (hereinafter referred to as "the applicant" or "the Department") against OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs (Appeals), Kandla in the case of M/s Cargill India Pvt. Ltd., 14<sup>th</sup> Floor, Building No. 9A, DLF Cyber City, Phase-III, Gurgaon - 122 002, Haryana (hereinafter referred to as "the respondent").

2.1 The respondent had filed 23 shipping bills under AIR drawback claim. A show cause notice cum deficiency memo had been issued to the claimant wherein queries were raised about whether the product manufactured or exported by availing the rebate of central excise duty paid on materials used in the manufacture of export goods in terms of Rule 18 of the CER, 2002 or if such raw materials were produced without payment of central excise duty under Rule 19(2) of the CER, 2002 and other queries raised in respect of the shipping bills.

2.2 The Assistant Commissioner (DBK), Custom House, Kandla observed that in 20 shipping bills where the respondent had exported their goods "Indian Soyabean Meal" from Kandla port availing duty drawback and the said exported goods were purchased by them from the manufacturers from open market and these goods had been manufactured by availing the benefit of Rule 19(2) of the CER, 2002 by procuring "Hexane" the main ingredient of the final product without payment of central excise duty by following the procedure prescribed under Rule 19(2) of the CER, 2002 and notifications issued thereunder. The said Hexane procured without payment of duty was used in the manufacture of exported product under claim of drawback @ 1% of FOB value as per AIR of drawback prescribed vide Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/07-Cus(NT) dated 16.07.2007 as superseded by Notification No. 103/2008-Cus(NT) dated 29.08.2008. These notifications stipulated that 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 no drawback was to be allowed if the said goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid. Since in this case, the applicant had used materials procured without payment of central excise duty, the Assistant Commissioner vide his Order-in-Original No. KDL/AC/MG/582/DBK/2011 dated 27.03.2012 rejected the drawback claims for AIR drawback.

3. Aggrieved by the OIO, the respondents filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) averred that procurement of raw materials under Rule 19(2) of the CER, 2002 would not be a hindrance for claiming 1% drawback being the customs component. He took note of the fact that the dispute related to the period prior to 17.09.2010. However, he discussed the contents of Circular No. 35/2010-Cus dated 17.09.2010 for interpretation of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) & 103/2008. He observed that condition 5/6 of these notifications identifies the customs component when CENVAT facility has been availed. It also clarifies that in a situation where the drawback under the category of CENVAT facility availed and CENVAT facility not being availed is the same signifies that the drawback pertains only to the customs component. The benefits under Rule 18 and Rule 19(2) would have no effect on drawback of customs component. He observed that the respondent no. 1 had claimed drawback of 1% of FOB value which was the customs component of AIR drawback. He averred that rebate of duty on export goods and drawback of customs component does not amount to double benefit. The Commissioner(Appeals) concluded that Notification No. 84/2010-Cus(NT) dated 17.09.2010 & Circular No. 35/2010-Cus dated 17.09.2010 reinforce the position that drawback of customs available even if facility under Rule 18 or Rule 19(2) has been availed. He held that circulars are clarificatory nature and would apply to notifications issued earlier if the provisions therein are identical and that Notification No. 84/2010-Cus(NT) and Circular No. 35/2010-Cus make explicit what was implicit in earlier notification. In the light of these findings, the Commissioner(Appeals) vide his OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 set aside the OIO with consequential relief to the appellants.

4. The Commissioner of Customs, Kandla found that the OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 was not legal and proper and therefore directed the Assistant Commissioner to file revision application on the following grounds :

- (i) AIR Drawback is not available when an exporter avails the facility under Rule 19(2) of the CER, 2002 as per condition 7(f) of Notification No. 81/2006-Cus(NT) and 8(f) of Notification NO. 103/2008-Cus(NT).
- (ii) Rule 5 of the Drawback Rules provides that revised rate of drawback could be given retrospective effect whereas in the instant case the benefit of AIR drawback has been allowed only w.e.f. 20.09.2010 under Notification No.

84/2010-Cus(NT) as clarified by the Office of the Drawback Commissioner vide letter dated 04.01.2012 and therefore there is no retrospective effect.

- (iii) Commissioner(Appeals) has ignored the clarification dated 04.01.2012 issued by Commissioner(Drawback) misinterpreting Board Circular No. 35/2010-Cus and Notification No. 84/2010-Cus(NT) although it clearly mentions that it is effective only w.e.f. 20.09.2010.
- (iv) Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)] wherein it was held that where it was evident that inputs had not suffered any duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed.
- (v) Reliance was also placed upon the judgment of the Hon'ble Supreme Court in the case of CCE, Chandigarh-I vs. Mahaan Dairies[2004(166)ELT 23(SC)], Hon'ble Delhi High Court in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)]. Reliance was placed upon the decision in the case of Sterling Agro Industries Ltd. Government of India Order No. 214-215/10-Cus dated 06.07.2010 against which the party filed W.P. No. 5894/2011 before the Division Bench of the Gwalior Bench of Hon'ble High Court of Madhya Pradesh and their Lordships held that drawback would be admissible under Rule 3(1) of the Drawback Rules if the benefit from payment of duty or rebate of CENVAT had been reversed, thus upholding the stand that simultaneous availment of drawback and Rule 19(2) cannot be permitted.
- (vi) The case laws of Mars International[2012(286)ELT 146(GOI)] and Aarti Industries Ltd.[2012(285)ELT 461(GOI)] relied upon by the Commissioner(Appeals) in the impugned order pertained to the period after ~~20.09.2010~~ after issuance of Notification ~~No. 84/2010-Cus(NT)~~ dated 17.09.2010.
- (vii) Even the C & AG had pointed out this fraud in PAC Audit Report No. 15/2011-12 in para 2.3.12.

5. Shri H. U. Patel, Superintendent(DBK), Custom House, Kandla attended the personal hearing on behalf of the Department on 03.10.2019 and reiterated the grounds of revision application. He submitted that the respondent was ineligible for the drawback and referred the case booked by DGCEI against similarly placed exporters. Letter F. No. S/20-06/DBK/RRA/2019-20 dated 30.09.2019 was received from the Assistant

Commissioner(DBK), Custom House, Kandla stating that he did not have anything more to add to the Revision Application and requesting that the case may be decided on merits. The respondent was granted a personal hearing on 26.07.2018, 07.08.2018 and 03.10.2019. However, none appeared on their behalf.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal. Government observes that the short issue in all these revision applications is whether duty drawback @ 1% of FOB value is admissible to the exporter respondent on the exports of Indian Soyabean Meal under Rule 3(1) of the Drawback Rules read with the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and 103/2008-Cus(NT) dated 29.08.2008.

7.1 It is observed that the manufacturers of the export goods had procured duty free hexane by availing the facility under Rule 19(2) of the CER, 2002 and used the same for the manufacture of Indian Soyabean Meal. Government takes note that the second proviso to Rule 3 of the Drawback Rules at clause (ii) thereof bars drawback if goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid. Similarly condition no. 7(f) of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) and condition no. 8(f) of Notification No. 103/2008-Cus(NT) provide that the rates of drawback specified in the schedule shall not be applicable to export of a commodity or product if such product is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. Thus it is apparent that the All Industry Rates of Drawback specified under the schedule annexed to the notifications are not applicable to the exporter of such goods if the goods have been manufactured with inputs on which duty has not been paid and have been procured by availing the facility under Rule 19(2) of the CER, 2002.

7.2 Government finds that the respondent has not denied the fact of duty free procurement of inputs and their use in the manufacture of export goods by the manufacturer and their export under claim of duty drawback. The inference that can be drawn from the condition in the notifications and Rule 3 of the Drawback Rules is that duty should necessarily have been suffered on the inputs used in the export product. This is also the settled legal position. The duty element on the inputs is the primary ingredient for deciding the admissibility of drawback on exports. With regard to the inferences drawn by the Commissioner(Appeals) in the impugned order based on CBEC

Circular No. 35/2010-Cus dated 17.09.2010, it is apparent from the text of the circular that the clarification regarding drawback in a situation where the raw materials have been procured without payment of central excise duty under Rule 19(2) of the CER, 2002 has been specifically stated to be admissible only with reference to Notification No. 84/2010-Cus(NT) dated 17.09.2010. It is pertinent to note that the portion where the issue has been raised in clause (d) of para 4(vi) of the circular, the notification mentioned is Notification No. 103/2008-Cus(NT) dated 29.08.2008. However, the notifications determining AIR rate of drawback for the preceding periods do not find mention in the portion where the reference has been answered and only Notification No. 84/2010-Cus(NT) dated 17.09.2010 finds mention. Therefore, it is obvious that the clarification issued by the Board applies only to Notification No. 84/2010-Cus(NT) dated 17.09.2010 which is applicable from 20.09.2010. The issue has been settled beyond doubt by the clarification issued by the Office of the Drawback Commissioner vide his letter F. No. 609/292/2008-DBK dated 04.01.2012 to the Federation of Indian Export Organisation.

8.1 Government takes note of the judgments of the courts on the issue. In the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)], the apex court upheld the principle that when there is evidence that the inputs had not suffered duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed. So also, in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)], their Lordships held that "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty and if goods like agricultural inputs are not imported and do not suffer incidence of excise duty, the question of fixing AIR for such commodities cannot arise. In the case of Suraj Impex (India) Pvt. Ltd. vs. Secretary, Union of India[2017(347)ELT 252(M.P.)], the Hon'ble High Court of Madhya Pradesh held that simultaneous availment of drawback as well as Rule 19(2) was introduced by omission of clause 8(f) of the erstwhile Notification No. 103/2008 and the introduction of new clause 9(b) in Notification No. 84/2010 which was made effective from 20.09.2010 and explained the same in Circular No. 35/2010. Since the Notification No. 84/2010 was effective from 20.09.2010 and the same cannot be given retrospective effect in the light of the aforementioned facts.


8.2 Government observes that in the case of Anandeya Zinc Oxides Pvt. Ltd.[2016(337)ELT 354(Bom.)], the Hon'ble Bombay High Court had occasion to examine the argument put forth by that manufacturer that drawback of customs portion could be availed alongwith facility for procurement of inputs under Rule 19(2) of the

CER, 2002. The Hon'ble Bombay High Court found that the view taken by the authorities below that the petitioners in that case could not avail customs drawback under Notification No. 26/2003-Cus(NT) dated 01.04.2003 could not be faulted. It was further held that there was no scope for bifurcating drawback towards customs and excise allocation. Their Lordships noted that the notification clearly provides an exclusion to the applicability of the entire notification in specific situations which have been specified therein; one of which was - goods manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. They opined that nothing could be read into such notification and that it was well settled that taxation and fiscal statutes have to be strictly construed. Their Lordships firmly held that the Courts cannot read words into such provisos. The judgments of the Apex Court and the High Courts are binding precedents. Therefore, Government concludes that AIR drawback is not admissible to the respondent and the drawback sanctioned and paid to the said respondent is liable to be recovered alongwith interest.

9. Government therefore sets aside the impugned OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014. However, it appears from the shipping bill dates mentioned in the order-in-original that some of the exports may have been effected after 20.09.2010 and therefore there will be no bar of availing facility under Rule 19(2) of the CER, 2002 for AIR drawback in these cases. These proceedings are remanded back to the original authority for the limited purpose of deciding the claims for AIR drawback in respect of exports effected after 20.09.2010.

10. Revision applications filed by the Department are disposed off in the above terms.

11. So ordered.

  
( SEEMA ARORA )

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India

ORDER No. 02 /2020-CUS(WZ) /ASRA/Mumbai DATED 31.01.2020.

To,  
M/s Cargill India Pvt. Ltd.  
14<sup>th</sup> Floor, Building No. 9A,  
DLF Cyber City, Phase-III,  
Gurgaon - 122 002  
Haryana

Copy to:

1. The Commissioner of Customs, Custom House, Kandla.
2. The Commissioner of Customs(Appeals), Kandla.
3. ~~Sr. P.S. to AS (RA), Mumbai~~
4. Guard file
5. Spare Copy