F. No. 198/68/13-RA
F. No. 198/66/13-RA
F. No. 198/67/13-RA
REGISTERED SPEED POST AD

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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 198/68/13-RA (222
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Date of Issue: 07.01.2020

ORDER NO. 107-108-109 /2020-CX (WZ) /ASRA/MUMBAI DATED 03.01.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner
Central Excise & Service Tax,
LTU, Mumbai

Respondent: M/s Lupin Ltd.
3rd Floor, Kalpataru Inspire,
Off. W. E. Highway,
Santacruz(East),
Mumbai 400 055

Subject : Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. BPS/43/LTU/MUM/2013 dated 28.03.2013, OIA No. BPS/16-19/LTU/MUM/2013 dated 25.02.2013 & OIA No. BPS/30-31/LTU/MUM/2013 dated 28.02.2013 passed by the Commissioner(Appeals), Central Excise & Service Tax, LTU, Mumbai.

ORDER

These revision applications have been filed by the Commissioner, Central Excise & Service Tax, LTU, Mumbai(hereinafter referred to as "the applicant") against OIA No. BPS/43/LTU/MUM/2013 dated 28.03.2013, OIA No. BPS/16-19/LTU/MUM/2013 dated 25.02.2013 & OIA No. BPS/30-31/LTU/MUM/2013 dated 28.02.2013 passed by the Commissioner(Appeals), Central Excise & Service Tax, LTU, Mumbai in the case of M/s Lupin Ltd.(hereinafter referred to as "the respondent").

2.1 The respondent has one of their manufacturing units situated at A-28/1, MIDC Aurangabad – 431 210, Maharashtra are engaged in the manufacture of excisable goods falling under the schedule to the CETA, 1985. The respondent had filed 113(34 + 79) rebate claims for a total amount of Rs. 2,41,44,263/- in terms of Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 read with Section 11B of the CEA, 1944 for the goods cleared from their factory for export by air through the Chhatrapati Shivaji International Airport, Sahar, Mumbai and also through JNPT, Nhava Sheva.

2.2 It appears from the rebate claims that the respondent had exported pharmaceutical products falling under chapter sub-heading 3004 of the CETA, 1985 on payment of duty of excise at tariff rate i.e. @ 10% adv. without availing the benefit of Notification No. 4/2006-CE dated 01.03.2006, as amended. It appeared from the ER-1 Returns filed by the respondent that they had availed the benefit of Notification No. 4/2006-CE dated 01.03.2006 as amended for clearances for home consumption and had paid central excise duty @ 5% adv. In this view, it appeared that the respondent had paid duty at tariff rate on their product cleared for export with an intention to claim enhanced rebate on the same. Therefore, the respondent did not appear to be eligible for rebate of excise duty paid on exported products in excess of duty payable on the said products.

2.3 Therefore, show cause notices were issued to the respondent calling upon them to show cause as to why the rebate claims should not be restricted to the effective rate of duty @ 5.15% and the rebate amounting to Rs. 1,20,72,132/-(Rs. 40,38,886/- + 80,33,246/-) should not be treated as deposit under sub-section (2) of Section 11B of the Central Excise Act, 1944. The Deputy Commissioner, LTU adjudicated the show cause notices and sanctioned the amount paid @ 5% adv. as rebate and allowed the remaining amount as refund under Section 11B of the CEA, 1944 in the manner in which it was paid; by way of credit in their CENVAT credit account.

3. Aggrieved by the orders-in-original, the respondent filed appeal before the Commissioner(Appeals), Central Excise & Service Tax, LTU, Mumbai on the ground that the adjudicating authority had erred in rejecting the remaining part of the rebate claimed and the education cess. They requested that the orders-in-original be set aside to that extent and directions be issued for sanction of the full rebate claimed instead of re-credit thereof in their CENVAT account.

4. The Commissioner(Appeals) vide his OIA No. BPS/43/LTU/MUM/2013 dated 28.03.2013 & OIA No. BPS/16- 19/LTU/MUM/2013 dated 25.02.2013 held that the orders-in-original restricting the rebate claims to the extent of duty paid @ 5% under Notification No. 04/2006-CE dated 01.03.2006 were not sustainable in law and required to be modified. He placed reliance upon the Board Circular No. 795/28/2004-CX. dated 28.07.2004 and case law of Collector vs. Indian Petro Chemicals[1997(92)ELT 13(SC)]. Commissioner(Appeals) modified the orders-in-original to the extent of re-crediting the respondents CENVAT account as refund of excess duty paid by them. He held that the entire amount of duty paid on the export of goods deserves

to be allowed as rebate under the rules and allowed the appeals with consequential relief.

5. The Department did not find the order of the Commissioner(Appeals) to be legal, proper and correct and therefore filed revision applications on the following grounds :

(i) The judgment in the case of CCE, Baroda vs. Indian Petro Chemicals[1997(92)ELT 13(SC)] relied upon by the Commissioner(Appeals) had been distinguished in the decision of Cadila Health Care Ltd., Ahmedabad[2013(288)ELT 133(GOI)].

(ii) It was further observed that the Hon'ble High Court of Punjab & Haryana had examined this issue in the case of M/s. Nahar Industrial Enterprises Ltd. vs. UOI[2009(235)ELT 22(P&H)]. In that case, the High Court had rejected an appeal of the assessee who had averred that they were eligible for refund of the entire amount paid by them in cash whereas the Department had held that they were eligible for refund in cash only for the amount which had been deposited as cash.

(iii) The Circular No. 795/28/2004-Cx. dated 28.07.2004 which was relied upon by Commissioner(Appeals) was not applicable to the facts of the present case as the two notifications in this case are not conditional notifications prescribing two effective rates. It was further averred that there was no such circular issued in case of pharmaceutical products pertaining to the notification in question.

(iv) Reliance was placed upon para 9.3 of the decision of the Revisionary Authority in the case of Cadila Health Care Ltd., Ahmedabad[2013(288)ELT 133(GOI)]. In the said para, it was observed that Notification No. 2/2008-CE provides for general tariff rate and Notification No. 4/2006-CE provides for effective rate of duty. Therefore, they have to be read together as

stipulated in para 4.1 of Part-I of Chapter 8 of the CBEC Excise Manual. It was therefore held that duty was payable @ 4% on export goods also and rebate cannot be granted on duty paid in excess of effective rate prescribed in Notification No. 4/2006-CE dated 01.03.2006, as amended.

(v) In addition to the grounds detailed at (i) to (iv) above, the Department's revision application also contained two additional grounds in the application filed against OIA No. BPS/ 16-19/LTU/ MUM/2013 dated 25.02.2013. In the case of some ARE1's, the adjudicating authority had observed that the duty paid as per ARE1 was more than the duty payable on the transaction value; i.e. FOB value. It was pointed out that in para 12.7 of the decision in the case of Cadila Health Care Ltd.[2013(288)ELT 133(GOI)], it was held that the adjudicating authority had rightly restricted and sanctioned rebate claim partly upto duty paid @ 4% of FOB value which was determined as transaction value of the goods in terms of Section 4 of the CEA, 1944 and also held that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and must be treated as voluntary deposit with the Government which is required to be returned to the applicant in the manner in which it was paid as the said amount cannot be retained by the Government without any authority of law.

(vi)The respondent had filed appeal before Commissioner(Appeals) only for that portion of the refund order which had been sanctioned by the adjudicating authority by way of credit in CENVAT account being excess duty paid to the extent of basic duty of 5% + Education Cess; i.e. for an amount of Rs. 80,33,246/-(Rs. 14,77,987/- + Rs. 14,38,836/- + Rs. 45,12,887/- and Rs. 6,03,536/-). The Commissioner(Appeals) had erred in setting aside the orders to the extent the adjudicating authority had rejected the rebate claims; i.e. by

not sanctioning the rebate claim by RTGS. The Commissioner(Appeals) had instead of passing order only for the portion appealed against, allowed sanction of refund in cash of duty paid in excess of duty payable under Notification No. 4/2006-CE dated 01.03.2006 as amended as well as the excess duty paid on account of difference in FOB value and ARE-1 value. The respondent had not filed appeal against these amounts.

On the basis of the above grounds, it was prayed that the Orders-in-Appeal allowing the amount of duty paid on export of goods as rebate and allowing the party's appeal with consequential relief be set aside.

6.1 In another set of rebate claims, the respondent had filed 12 rebate claims amounting to Rs. 10,30,426/- and 9 rebate claims amounting to Rs. 7,83,550/- under Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2002 read with Section 11B of the CEA, 1944 for the goods falling under chapter 30 cleared from the factory of other manufacturers viz. M/s Samrudh Pharmaceuticals Pvt. Ltd., Boisar, Thane, M/s Astral Pharma Industries, Vadodara and M/s Midas Care Pharmaceuticals Pvt. Ltd., Aurangabad and exported by sea from Nhava Sheva, JNPT, Mumbai or by air from Air Cargo Complex, Sahar, Mumbai.

6.2 The adjudicating authority observed that since the merchant exporter/manufacturer and the buyer are not related persons, the excise duty should have been levied on the transaction value. The value in terms of Section 4 of the CEA, 1944 should be the amount that the buyer of the exported goods has paid/is liable to pay. In the instant case, the buyer of the exported goods has paid/is liable to pay the amount as shown in the shipping bills corresponding to the FOB value and the same value is

accepted as the transaction value. Since the goods were exported in terms of Rule 18 of the CER, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004 as amended, the merchant exporter is entitled for the excess duty paid by way of refund under Section 11B of the CEA, 1944 in the manner in which it was paid; i.e. by way of credit in their CENVAT credit account maintained under the provisions of CCR, 2004. The adjudicating authority further observed that the revision application filed by the Commissioner, LTU, Mumbai against OIA No. RBT/21-23/LTU/MUM/2011 dated 28.04.2011 where the respondent was the claimant had been decided vide Order No. 1715-1717/11-CX dated 29.12.2011 by the Joint Secretary to the Government of India wherein the government had held that the claimant is entitled to rebate of duty paid on the value determined under Section 4 of the CEA, 1944. The balance amount paid as excess duty has to be treated as voluntary deposit with the Government and is to be returned in the manner in which it was paid to the Government. Therefore, Government had permitted to re-credit the excess paid amount in the CENVAT credit account from where the duty had been paid. The refund claims filed by the respondent were sanctioned under two OIO's by the adjudicating authority in such manner.

7. Aggrieved by the orders-in-original, the respondent filed appeal before the Commissioner(Appeals) on the ground that the adjudicating authority had erred in rejecting a part of the rebate claimed. They requested for setting aside the orders-in-original to that extent and to issue directions to sanction full rebate instead of re-credit thereof in their CENVAT account.

8. The Commissioner(Appeals) held that the orders-in-original are not sustainable in law and therefore set aside the orders. He placed reliance upon the following case laws and Board's circular:

(a) V.S.T. Industries Ltd.[1993(67)ELT 997(G01)];

(b) Siddhartha Tubes Ltd.[1999(114)ELT 1000(Tri)];

(c) CCE, Delhi-I vs. M. F. Rings & Bearing Races Ltd.[2000(119)ELT 239 (Tri)] ;

(d) Sri Bhagirath Textiles Ltd.[2006(202)ELT 47(GOI)];

(e) Colour Chem Ltd. [1986(25)ELT 402(Tri)];

(f) Board Circular No. 203/37/96-CX. dated 26.04.96;

(g) Board Circular No. 510/06/2000-CX. dated 03.02.2000.

The Commissioner(Appeals) vide OIA No. BPS /30-31/LTU/MUM/2013 dated 28.02.2013 ordered for setting aside the orders-in-original and allowed the appeals with consequential reliefs.

9. The Department did not find the order of the Commissioner(Appeals) to be legal, proper and correct and therefore filed revision applications on the following grounds :

(i) The rebate claims had correctly been sanctioned by the adjudicating authority on, the basis of the Order No. 1715-1717/11-CX dated 29.12.2011 passed by the Revisionary Authority in revision application filed against OIA No. RBT/21-23/LTU/MUM/2011 dated 28.04.2011 in the very same respondents case. The Commissioner(Appeals) had not taken cognizance of the Revisionary Authoritys order dated 29.12.2011.

(ii) The Commissioner(Appeals) reliance upon Board Circular No. 203/37/96-CX dated 26.04.96 was misplaced as the said circular had been modified by Board Circular No. 510/06/2000-CX dated 03.02.2000. Moreover, the Revisionary Authority had examined the relevant statutory provisions and decided the revision application filed by the Department vide Order No. 1715-1717/11-CX dated 29.12.2011. The Revisionary Authority had also decided revision applications, filed by M/s Cadila Health Care Ltd.[2013(288)ELT 133(GOI)] wherein it was held that w.e.f.

01.07.2000, the transaction value was introduced for valuation of goods under CEA, 1944 and therefore the said circular issued prior to the introduction of the concept of transaction value cannot be applied for the period after 01.07.2000. Para 3(b)(ii) of Notification No. 19/2004-CE(NT) dated 06.09.2004 was referred and it was observed that the rebate sanctioning authority was to examine the rebate claim and then sanction the claim in whole or in part, depending on the facts of the case.

(iii) The judgment of the High Court of Punjab and Haryana in the case of Nahar Industrial Enterprises Ltd. vs. U01[2009(235)ELT 22(P&H)] was relied upon. In that case, it was held that refund in cash of higher duty paid on export product which was not payable is not admissible and refund of the said excess duty paid/amount in CENVAT credit is appropriate. As such, the amount/duty paid in excess is required to be returned to the respondent in the manner in which it was initially paid by them.

(iv) The Commissioner(Appeals) had erred in placing reliance upon the decision in the case of Bhagirath Textiles Ltd.[1996(202)ELT 147(GOI)1, as the Government had in that revision application filed by the Department, decided that excise duty is to be paid on the transaction value of goods and not on its CIF value. In that case, it was further held that since the respondents had paid excess duty to the tune of Rs. 2,35,192/- which was to be refunded to them in the manner in which it was paid and set aside the impugned OIA. The respondents in that case were permitted to take back the excess CENVAT credit of Rs. 2,35,192/- which was related to central excise duty paid on CIF value of the goods.

(v) Government had while deciding the revision applications filed by Cadila Health Care Ltd.[2013(288)ELT 133(GOI)] in para 12.5 of the order, following the decision in the case of Bhagirath Textiles Ltd.[1996(202)ELT 147(GOI)], held that

the place of removal in case of export can be the port of export if the sale takes place at the port of export. It was also noted that in any case duty is not to be paid on the CIF value of the goods.

(vi) All the CESTAT case laws, board circulars relied upon by the Commissioner(Appeals) pertain to the period prior to the introduction of transaction value w.e.f. 01.07.2000 and therefore cannot be applied to the period thereafter.

(vii) The Commissioner(Appeals) has relied upon the CESTAT decision in the case of CCE, Delhi-I vs. M. F. Rings & Bearing Races Ltd.[2000(119)ELT 239(Tri)] where the issue was that the rebate claim had been rejected in respect of portion of duty which had been paid in excess on the value of freight, insurance and commission/discount as the same could not be treated as duty paid against excisable goods and hence cannot be refunded in cash under Rule 12(1)(a) of the CER, 1944. The adjudicating authority in that case, had disallowed rebate claim of Rs. 5,30,081/- under Section 11B of the CEA, 1944 whereas in this case the adjudicating authority had not rejected the claim but had sanctioned the excess amount paid by way of credit in CENVAT credit account.

On the basis of these grounds, it was prayed that the impugned OIA allowing the respondents appeal with consequential benefits be set aside and suitable orders be issued considering the above points.

10. Personal hearing was granted in the matter on 23.08.2019. None appeared on behalf of the Department. Shri Rohit Bajaj, DGM, Indirect Tax and Shri Harsh Dharnidharka, Manager, Indirect Tax appeared on behalf of the respondent. In the written submissions filed by the respondent on 27.08.2019, they submitted that indirect tax was a transaction level tax and hence the choice of the more beneficial notification can be made for each transaction unless specifically mentioned in a particular

notification that the option would have to be exercised for a particular period. They further submitted that even if it is assumed that the Departments contention was correct, considering the implementation of GST, re-credit was no longer an option. They placed reliance upon the GST Circular No. 37/11/2018-GST dated 15.03.2018 wherein it was clarified that after 01.07.2017, any amount allowable as re-credit in CENVAT credit was to be granted as cash refund in terms of Section 142(3) of the CGST Act, 2017. They also drew attention to the OIA No. PK/427 to 440/ME/2018 dated 29.05.2018 passed by the Commissioner(Appeals-II) of CGST & Central Excise involving similar issue in another matter whereby the order of the rebate sanctioning officers order sanctioning cash refund of the excess central excise duty paid instead of re-credit was challenged by the Department before the Commissioner(Appeals). In that case, the Commissioner(Appeals) had held that excess central excise duty paid had to be provided as cash refund to the assessee in accordance with Section 142(3) of the CGST Act, 2017 as clarified vide GST Circular No. 37/11/2018-GST dated 15.03.2018.

11.1 Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal. There are two issues involved under these revision applications. The first issue involved is that the respondent had paid central excise duty @ 5% adv. for clearance of their goods for home consumption as per Sr. No. 62C of Notification No. 4/2006-CE dated 01.03.2006. However, they had voluntarily paid basic excise duty at higher rate of 10% adv. while exporting the same goods without availing the benefit of Notification No. 4/2006-CE dated 01.03.2006. Although the respondent was entitled for benefit of the said notification which gave them greater relief, they paid duty at rate specified under Notification No. 2/2008-CE dated 01.03.2008 on the products which were cleared for export

with intention to claim enhanced/more rebate. According to the Department, the apparent motive of clearing export goods at higher rate of duty @10% and goods for home consumption at 4% was to encash the accumulated CENVAT credit. The Department is of the view that the respondent would be entitled to excess duty paid by way of refund under the provisions of Section 11B of the CEA, 1944 in the manner in which it was paid; viz. by way of credit in their CENVAT credit account. On the other hand, the respondent contends that both notifications; i.e. Notification No. 2/2008-CE dated 01.03.2008 for their export consignments and Notification No. 4/2006-CE dated 01.03.2006 for their domestic clearances were in existence on the relevant date and they were both mutually exclusive. The respondent claimed that they were therefore eligible for the benefit of both exemption notifications simultaneously.

11.2 The second issue involved under these revision applications is whether a part of the amount of rebate which is excess amount of duty paid than what is required to be paid based on transaction value; i.e. FOB value as mentioned in the shipping bill, is to be paid in cash or otherwise. The question here is whether the rebate was to be confined to the duty payable on the basis of the FOB value when the same was less than the ARE-1/~~excise invoice~~ value actually paid or the ~~whole of the~~ duty paid was to be sanctioned as rebate. The Departments stand is that the respondent is entitled to rebate of duty payable on the value determined under Section 4 of the Central Excise Act, 1944. The balance amount of duty, if any, paid in excess has to be treated as voluntary deposit with the Government. The Department averred that the said excess paid amount was to be returned in the manner in which it was paid to the Government. Therefore, it would be

permissible for the respondent to take re-credit of the excess paid amount in CENVAT credit from where the duty was paid.

12.1 The genus of the issue is the view that in terms of the provisions of Section 5A(1A) of the CEA, 1944, an assessee cannot decline to avail the benefit of an unconditional exemption notification. Before forming any views about the issue itself, it would be pertinent to understand the scope of the embargo under sub-section (1A) of Section 5A of the Central Excise Act, 1944. The text of the said sub-section (1A) of Section 5A of the Central Excise Act, 1944 is reproduced below.

> "(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods."

12.2 There are two crucial phrases in the sub-section which require careful consideration; viz. "whole of the duty of excise leviable thereon" and "granted absolutely". The inference that can be drawn is that the phrase "whole of the duty of excise leviable thereon" would mean an exemption which exempts excisable goods entirely or extinguishes the entire duty leviable on those goods. Similarly, the words "granted absolutely" signify that the exemption granted is complete or unconditional. In other words there are no provisos or conditions to the exemption granted. Purely by virtue of being the manufacturer of the goods specified in the exemption notification, the manufacturer becomes eligible for the exemption granted. When the sub-section (1A) of Section 5A of the CEA, 1944 is read in its entirety, it would be inferable that in a situation where the manufacturer is eligible for an exemption from the entire duty leviable on the excisable goods manufactured without any conditions attached, the manufacturer would no longer have the option to pay duty of excise on such excisable goods.

13.1 In the present case, the respondent is availing the benefit of two notifications. The benefit of Notification No. 4/2006-CE dated 01.03.2006 is availed by the respondent for payment of duty @ 5% on home clearances whereas they pay duty @ 10% on the export goods in terms of Notification No. 2/2008-CE dated 28.02.2008. It is observed that while Notification No. 4/2006-CE dated 01.03.2006 provides for an effective rate of 5%, the Notification No. 2/2008-CE dated 28.02.2008 specifies duty 10%. Both these notifications do not grant full exemption. Therefore, by no stretch of imagination can the embargo of Section 5A(1A) of the CEA, 1944 be said to apply to the facts of the present case.

13.2 In this view of the matter, since Circular No. 795/28/2004-CX., dated 28.07.2004 involves Notification No. 30/2004-CE dated 09.07.2004 which exempts from the whole of the duty of excise, it would follow that nothing would prevent the respondent in the present case from simultaneously availing the benefit of Notification No. 4/2006-CE dated 01.03.2006 and Notification No. 2/2008-CE dated 28.02.2008 which are only granting partial exemption to the respondent. Government further notes that the judgment in the case of Nahar Industrial Enterprises Ltd. vs. UOI[2009(235)ELT 22(P&H)] involved circumstances where that assessee had simultaneously availed the benefit of Notification No. 29/2004-CE dated 09.07.2004 & Notification No. 30/2004-CE dated 09.07.2004 for domestic clearances whereas they had paid duty at the tariff rate on export goods. The rebate sanctioning authority had thereupon sanctioned rebate in cash for the amount of duty paid through cash and the remnant was recredited into their CENVAT account. The contention of Nahar Industrial Enterprises Ltd. that they were eligible for the rebate of the entire amount of duty paid in cash was rejected by the Hon'ble High Court of Punjab and Haryana. Therefore, the facts of the case in Nahar Industrial Enterprises Ltd. and the present case are different and hence the ratio of that judgment would not apply to the present case.

14.1 The orders passed by the Government in the case of Cadila Health Care Ltd.[2013(288)ELT 133(GOI)], Bhagirath Textiles

Ltd.[1996(202)ELT 147(GOI)] and other case laws relied upon by the Department in the Revision Applications filed cannot be followed as the ratio of these decisions has been superseded by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)]. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"9. On, thus, having heard both the sides and on examination of the material on record, the question that involves in these petitions is the wrong availment of the benefit of concessional rate of duty vide Notification No. 59/2008, dated December 7, 2008. Admittedly, the final products were exempted from payment of duty by original Notification No. 29/2004-C.E., dated July 9, 2004 as further amended vide Notification No. 59/2008-C.E., dated December 7, 2008. The fact is not being disputed by the respondents that the petitioner availed Notification No. 59/2008 for clearance made to export and thereafter filed various rebate claims. It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*

10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. The stand of the Revenue is also not sustainable that the payment of duty on final products exported at the will of the assessee cannot be compared with other type of cases of refund/rebate of duty. Admittedly, when the petitioner was given exemption from payment of whole of the duty and the petitioner if had paid duty at the time of exporting the goods, there is no reason why it should be denied the rebate claimed which otherwise the petitioner is found entitled to. We are not going into the larger issues initially argued before us as subsequently the Revenue has substantially admitted the claim of rebate of excise duty and has not resisted in substance such claim of rebate.

11. Resultantly, both the petitions are allowed quashing and setting aside the orders impugned in both the petitions by further directing the respondents to grant the petitioner of Special Civil Application No. 10887 of 2012 rebate of Rs. 3,15,63,741/- (Rupees Three Crore Fifteen Lac Sixty Three Thousand Seven Hundred Forty One only) and Rs. 39,59,750/- (Rupees Thirty Nine Lac Fifty Nine Thousand Seven Hundred Fifty only) to the petitioner of Special Civil Application No. 10891 of 2012, by calculating interest thereon under Section 11BB of the Central Excise Act, 1944, within a period of eight weeks from the date of receipt of a copy of this judgment."

14.2 It would be inferable from the judgment of the High Court that when there are two unconditional exemption notifications which co-exist, there cannot be any compulsion on the assessee to avail the one which fully exempts excisable goods because such an interpretation would render the exemption with the higher rate of duty to be redundant. Needless to say, all exemptions issued under Section 5A of the CEA, 1944 are issued in public interest with some specific legislative intent and cannot be rendered inconsequential. Applying the ratio of the judgment of the Hon'ble Gujarat High Court which has been affirmed by the Hon'ble Apex Court, it would follow that the respondent cannot be faulted for availing the benefit of Notification No. 2/2008-CE dated 01.03.2008. The respondent is therefore eligible for the benefit of rebate of duty paid on the exported goods.

15. The Department has also contended that the applicant has chosen this method of availing the benefit of Notification No. 2/2008-CE inspite of being eligible for the benefit of Notification No. 4/2006-CE with the intent to encash the CENVAT credit availed on capital goods. Since there is no bar, the respondent is very well entitled to the benefit of CENVAT credit. Therefore, there can be no challenge to the availment of CENVAT credit. Needless to say, payment of duty from the CENVAT account is equitable with duty paid through account current and hence would be admissible as rebate. The contention made out in the revision application about the motive of encashment of accumulated CENVAT credit is not prohibited by any provision in the notifications or by the statute.

16.1 With regard to the issue of sanction of rebate claim in cash of the difference between the duty paid by the respondent and the FOB value of the goods, the para 3(b)(ii) of the Notification No. 19/2004-CE(NT) dated 06.09.2004 would be of relevance. The relevant text is reproduced below.

"3(b) Presentation of claim for rebate to Central Excise :-

(i) .....

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."

The provisions of this notification clearly stipulate that depending upon the facts of the case, after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or in part, as the case may be.

16.2 It is therefore apparent that the notification does envisage a situation where the rebate may not be fully sanctionable.

Conversely, there is no binding on the sanctioning authority to sanction every rebate claim to the full extent of duty paid. In a situation where the FOB value declared in shipping bill is lower than the value declared in ARE-1, the FOB value as declared in the shipping bill has to be considered as the transaction value of the goods. Since duties of excise are payable as per the transaction value, rebate would also be admissible only to such extent. It is observed from the text of Section 4 that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale" has to be construed as a place within the geographical limits of India. Once the place of removal is decided within the geographical limits of the country, its value cannot be adopted for a place beyond the port of loading of the export goods. The place of removal can either be factory, warehouse or port of export and expenses of freight/insurance incurred upto place of removal can form part of its assessable value. Therefore, the place of removal would be the port of export if sale takes place at the port of export. In the case of *CCE, Nagpur v. M/ s. Sri Bhagirth Textiles Ltd.* reported as 2006 (202) E.L.T. 147 (G.O.I.), the Revisionary Authority held that :

> *"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944".*

16.3 It is clear beyond doubt that in any case duty is not to be paid on the CIF value. Hence, the rebate claim would also be admissible only to the extent of the FOB value of the export goods. In the present case, the respondent would be eligible for rebate in cash of duty paid at the rate of 10% adv. on the FOB value of the goods. This issue has also been discussed at length in the case of Cadila Health Care Ltd.[2013(288)ELT 133(GOI)1 and the conclusion arrived at is that rebate in cash would be admissible

only for the duty payable on the transaction value; viz. the FOB value of the goods. It is also unfortunate that the Commissioner(Appeals) has chosen to overlook the decision of the Revisionary Authority in the very same respondents case vide Order No. 1715-1717/ 11-CX dated 29.12.2011. Any amount paid in excess of the said duty liability must be treated as voluntary deposit with the Government which is required to be returned to the claimant for rebate in the manner in which it was paid. The circulars relied upon by the Commissioner(Appeals) while passing the impugned order pertain to the period before the introduction of "transaction value" on 01.07.2000 and are therefore not applicable.

16.4 The Departments contention vis-à-vis the decision of the Tribunal in CCE, Delhi-I vs. M. F. Rings and Bearing Races Ltd.[2000(119)ELT 239(Tri)] as containing different facts is accurate as in that case the sanctioning authority had outrightly rejected the claim in respect of the excess amount paid as duty on the export goods. Government notes that there is a ground made out by the Department in the revision application filed against OIA No. BPS / 16-19/ LTU/ MUM/ 2013 dated 25.02.2013 that the Commissioner(Appeals) has allowed benefit to the respondent beyond what they had appealed for before him. Needless to say, the Commissioner(Appeals) should have restricted himself to the portion of the order appealed against before him. It is pertinent to note that the respondent has not countered this ground even in the submission filed post hearing. As such, not filing appeal against a portion of the order signifies that the assessee is not aggrieved by that part of the order and has accepted that part of the order. The action of the Commissioner(Appeals) in suo moto taking up the part of the order which had been accepted by the party is disapproved of.

17. The respondent has also made some arguments about the fact that with the implementation of GST, allowing re-credit of the excess duty paid was no longer an option. They have also drawn attention to GST Circular No. 37/11/2018-GST dated 15.03.2018 wherein it has been clarified that post 1st July 2017, any amount allowable as re-credit of CENVAT credit has to be granted as cash refund in terms of Section 142(3) of the CGST Act, 2017. Government observes that the present proceedings are in exercise of the powers vested in terms of Section 35EE of the CEA, 1944 and must be exercised within the framework of the Central Excise Act, 1944. The provisions of the CGST Act, 2017 are not exercisable in revision. Therefore, the relief in this regard can only be obtained from the authorities empowered under the CGST Act.

18. The Revision Applications filed by the Department are disposed off by holding that the respondent is eligible for rebate of duty paid by availing the benefit of Notification No. 2/2008-CE dated 01.03.2008. However, the rebate claims would be restricted to duty paid on the FOB value of the goods which have been exported. The excess amount paid by the respondent is allowed as re-credit in their CENVAT account. The case is remanded back to the rebate sanctioning authority with a direction to verify and process the rebate claims within a period of six weeks from the receipt of this order. The revision applications filed by the Department are disposed of in the above terms.

19. So ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 107-108-109 /2020-CX (WZ) /ASRA/Mumbai DATED 03.01.2020.

F. No. 198/68/13-RA
F. No. 198/66/13-RA
F. No. 198/67/13-RA

To,

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431210

Copy to:

1. The Commissioner of CGST & CX, Aurangabad Commissionerate.
2. The Commissioner of CGST & CX, Mumbai West.
3. The Commissioner of CGST & CX(Appeals-III), Mumbai.
4. The Commissioner of CGST & CX(Appeals), Nagpur.
5. Sr. P.S. to AS (RA), Mumbai
6. Guard file
7. Spare Copy