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GOVERNMENT OF INDIA
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F. No. 371/66-77/DBK/16-RA
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F. No. 371/56/DBK/16-RA /8423

Date of Issue: 20.12.2018

ORDER NO. 1086-1099 /2018-CX (WZ) /ASRA/MUMBAI DATED 30.11.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Mahindra & Mahindra Ltd.
Farm Equipment Sector,
Akurli Road,
Kandivili(East),
Mumbai 400 101

Respondent : Commissioner, Central Excise, Mumbai-V

Subject : Revision Applications filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. SK/06 to 17/M-IV/2011 dated 11.05.2016, Order-in-Appeal No. SK/22/M-IV/2016 dated 27.06.2016 & Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016 passed by the Commissioner(Appeals), Central Excise, Mumbai Zone-I.

ORDER

These Revision Applications have been filed by M/s Mahindra & Mahindra Ltd, having office at Akurli Road, Kandivali (East), Mumbai-400101 against the Order in Appeal No. SK/06 TO 17/M-IV/2016 dated 11.05.2016, Order-in-Appeal No.SK/22/M-IV/2016 dated 27.06.2016 & Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016 & passed by Commissioner of Customs, (Appeals), Mumbai-I.

2.1 The brief facts of the case are that the applicants were engaged in the manufacture and export of tractors. Since the tractors were exempted from payment of Central Excise duty in terms of Notification No. 12/2012-CE dated 17.03.2012 and also for the reason that the applicants were not entitled to CENVAT Credit of the duty paid on the inputs and service tax paid on input services used in or in relation to manufacture of tractors, they opted for claiming special brand rate of duty drawback under Rule 7 of the Drawback Rules, 1995.

2.2 The Additional Commissioner, Central Excise, Mumbai-IV vide Order-in-Original No. 102/03/V/2014/ADDL/SD dated 05.05.2014 rejected their claim for duty drawback of Rs. 2,70,80,607/- and kept in abeyance their drawback claim of Rs. 3,64,262/- under Rule 7 of Customs, Central Excise & Service Tax Drawback Rules, 1995 on the tractors exported during the month of May 2012 & June 2012. The drawback claims were partly rejected by the impugned order.

3. Aggrieved, the applicants filed appeal against the impugned order on various grounds. The Commissioner(Appeals) vide his Order-in-Appeal No. SK/22/M-IV/2016 dated 27.06.2016 while allowing/remanding the applicants appeal on some grounds, decided some issues against them as detailed hereinafter:

(i) Since the applicant had filed for and received AIR rate of drawback, they were precluded from seeking brand rate fixation under Rule 7 of

the Drawback Rules. After choosing to avail AIR drawback, the applicant cannot be permitted to also claim special brand rate under Rule 7 of the Drawback Rules, 1995. He therefore did not interfere with the order to the extent it rejected the entire drawback claimed for the months of May 2012 and in respect of 60 shipping bills for the month of June 2012;

(ii) He concurred with the view of the lower authority that duty drawback cannot be allowed when customs duty is debited through DEPB scrip;

(iii) As regards exports to Nepal, the proceeds were not received in freely convertible foreign currency and therefore drawback was not admissible;

(iv) The weighted average method for working out duty incidence on inputs used in the manufacture of export product would be more appropriate to determine the duty element suffered on such inputs when the individual consignments of inputs used in manufacture or corresponding products cannot be identified;

(v) He held that where the CENVAT reversed was less than the drawback claimed, the applicant has not produced any list of inputs or corresponding invoices in respect of such inputs used exclusively in the manufacture of export products to substantiate their claim of non-availment of CENVAT on such inputs;

(vi) The applicants had not submitted BRC's. Since the BRC's are evidence of receipt of export proceeds, non-submission of such evidence casts a serious doubt on receipt of proceeds by the applicants in respect of such exports;

4.1 Similarly, the applicant had filed drawback claims for fixation of special brand rate of duty drawback under Rule 7 of Customs, Central Excise & Service Tax Drawback Rules, 1995 against the exports of tractors made during the financial years starting from July, 2012 to December, 2014, as the All India Rate(AIR) of drawback fixed by the

Central Government under Rule 3 of the Drawback Rules, 1995 was less than four-fifth of the duties/taxes paid by them on the input and input services used in the manufacture of tractors exported. The Additional Commissioner partly sanctioned the drawback claims filed by the applicant.

4.2 The applicant had filed appeal before the Commissioner(Appeals) against the following Orders-in-Original:

1. 162/01/V/2014/Addl/HBN dated 08.08.2014,
2. 172/02/1V/2014/Addl/HBN dated 14.11.2014.
3. 178/03/IV/2014/Addl/HBN dated 29.12.2014.
4. 08/04/IV/2015/Addl/HBN dated 28.01.2015.
5. 12/05/IV/2015/Addl/HBN dated 18.02.2015.
6. 34/06/IV/2015/Add1/HBN dated 13.03.2015.
7. 52/07/IV/2015/Addl/HBN dated 13.04.2015.
8. 92/08/IV/2015/Addl/ASM dated 04.08.2015.
9. 109/09/IV/2015/Addl/ASM dated 27.08.2015.
10. 118/10/IV/2015/Addl/ASM dated 30.09.2015.
11. 120/11/IV/2015/Addl/ASM dated 08.10.2015.
12. 131/12/IV/2015/Addl/ASM dated 28.10.2015.

4.3 The drawback so claimed was partly sanctioned and remaining portion of drawback was either reduced or rejected by the above mentioned Order-in-Originals on the grounds that the drawback claims of the exported goods where the import duties have been paid on inputs used in the manufactured export product by debiting the credits allowed in DEPB scrips was not admissible; all exports to Nepal were disallowed drawback on the ground that export proceeds were not realised in freely convertible currency; in the case of recoverable waste and scrap, the inputs to the extent contained in such waste and scrap cannot be said to have been used in the manufacture of export goods & for non-production of BRC's evidencing receipt of export proceeds.

5. Aggrieved by the Orders of the Original Authorities, the applicant had filed appeals before the Commissioner of Central Excise (Appeals). The Commissioner (Appeals) while offering partial relief to the applicants concurred with the lower authorities and rejected their drawback claims on the following grounds:

(i) Opting for AIR drawback under Rule 3 in the shipping bills disentitles the exporter from claiming brand rate of drawback. After choosing to avail AIR drawback, the applicant cannot be permitted to also claim special brand rate under Rule 7 of the Drawback Rules, 1995. He referred the circular dated 17.02.2003 and letter dated 31.12.2011 to reject the entire drawback claimed by the applicants for the month of May 2012 and in respect of 60 shipping bills for the month of June 2012 on this count.

(ii) The adoption of the weighted average of DBK-II and DBK-IIA and DBK-III and DBK-IIIA in the Orders-in-Original to determine the eligible drawback cannot be found fault with as against the method used by the applicant to calculate the weighted average of duty component mostly out of DBK-III/DBK-II without having taken average out of DBK-IIIA/DBK-IIA while working out the duty incidence.

(iii) The duty drawback of basic customs duty and cess debited through DEPB scrips cannot be allowed. He referred para 4.3.5 of the Foreign Trade Policy and averred that it allows drawback of only the additional duty of customs which implied that basic customs duty and cess paid by debit in DEPB would not be available as drawback. He also referred the circular no. 3/99-Cus. dated 3.02.1999 which disallowed drawback of duties debited under DEPB pass book scheme on import of goods as it is in effect availment of exemption of duty under the Customs Act. He also observed that this circular was modified by circular no. 41/2005-Cus. dated 28.10.2005 permitting drawback of additional customs duty paid through debit in DEPB. However, the circular was

silent with regard to basic customs duty and cess. The case laws cited by the applicant were also distinguished.

(iv) In the case of exports to Nepal, the export proceeds were received in Indian rupees and hence the applicants had not complied with the conditions of Foreign Exchange Management Act, 1999. Consequently there were not entitled for drawback in respect of exports made to Nepal.

(v) With regard to the lower authority's observation that CENVAT credit is less than drawback claimed, the appellate authority found that the applicant had been requested to furnish a list of inputs exclusively used in the manufacture of exported product as the applicant had claimed that they had not availed CENVAT on these. However, the applicant had failed to produce any such list of inputs or corresponding invoices in respect of such inputs to substantiate their claim of non-availment of CENVAT credit on such inputs.

(vi) Since the applicants had not submitted BRC's nor produced any extension from RBI to receive the export proceeds beyond the normal period specified by the RBI under the FEMA Act, 1999, the rejection of the drawback claims in such cases was upheld. Reliance was placed upon the provisions of FEMA, 1999 and Rule 16A of the Drawback Rules, 1995.

(vii) The duty component on the realizable sales value of waste and scrap arising during the manufacture of tractors being cleared on payment of central excise duty is required to be reduced from the total drawback claim. For determining drawback, first the duty incidence should be computed on all the raw materials including the reasonable quantum of waste and if any such waste is sold, then the average amount of duties on such waste should be deducted. Reliance was placed on the Board circular no. 108/2003-Cus. dated 17.12.2003.

(viii) The drawback of service tax credit availed on the basis of invoices issued by the job workers where the job workers were exempted from payment of service tax under Notification No. 25/2012-ST dated 30.06.2012 is not allowable. The service tax payment itself was erroneous

and therefore the drawback component of such service tax credit on such erroneous payment of service tax is also not allowable. Moreover, the exporter is not entitled to avail of or accrue such dual benefits in terms of service tax credit availment as well as the resultant drawback on such erroneous payment of service tax.

6. The grounds on which the instant Revision Applications have been filed challenging the Order-in-Appeal No. SK/06 to 17/M-IV/2016 dated 11.05.2016 & Order-in-Appeal No. SK/22/M-IV/2016 dated 27.06.2016 passed by Commissioner (Appeals) are stated briefly hereinafter:

(i) The claims filed by the applicant have been rejected on the ground that the AIR of drawback in terms of Rule 3 & 4 of the Drawback Rules had already been claimed in respect of the same shipping bills against which they were now claiming special brand rate of drawback under Rule 7 of the Drawback Rules, 1995. The applicant referred to Circular No. 10/2003-Cus. dated 17.02.2003 which provides for release of AIR of duty drawback on all claims under Rule 7 pending verification and finalization of special brand rate and submitted that by default an exporter is entitled to AIR of duty drawback under Rule 3. They therefore submitted that their claims for special rate of brand rate of duty drawback on the shipping bills pertaining to the month of May 2012 and on the 72 shipping bills for the month June 2012 upto 20.06.2012 cannot be rejected. They placed reliance upon the case laws of Thermax Ltd.[2014(311)ELT 1005(GOI)], Sandvik Asia Pvt. Ltd.[2014(312)ELT 1003(GOI)] & Alfa Laval (India) Ltd. vs. UOI[2014(309)ELT 17(Bom)] and made extensive submissions.

(ii) Rejection of claim for duty drawback of custom duties (Basic Customs + cess) debited in DEPB scrips is not sustainable under law as Hon'ble High Court of Gujarat in case of Ratnamani Metals and Tubes Ltd held that the duty drawback of customs duty paid

by debiting DEPB scrips is entitled to the assessee. They have further submitted that Hon'ble High Court of Madras had in the matter of Tanfac Industries held that goods cleared under DEPB Scheme cannot be treated as exempted goods but should be treated as duty paid goods.

(iii) The learned Commissioner's order upholding the Original Authorities Order rejecting the duty drawback on exports made to Nepal on the ground that the export proceeds were not realised in freely convertible currency is contrary to the provisions contained in Section 75 of the Customs Act, 1962, Section 37(2) (xvib) of the Central Excise Act, 1944 and Section 93A of the Finance Act and rules framed under the Drawback Rules, 1995. Harmonious reading of these provisions would reveal that the drawback of duties and taxes suffered at the input stage is allowed under these provisions, if the assessee undertakes to export such goods.

(iv) Applicant further relies upon the case laws mentioned in the appeal memorandum to contend that the statute should be interpreted on the face of the language itself without adding, subtracting or omitting words therefrom and that while construing a fiscal statute the plain meaning of the language has to be looked into and there is no room for intendment. Further, to thwart the attempt made by the lower authorities in construing the provisions contained in FEMA, 1999 and RBI Guidelines to deny the benefit extended under Drawback rules read with the Customs Act, the Applicant relies on ratio of the proposition laid down by the case laws mentioned in the Appeal memorandum suggesting that the requirements of a statute cannot be imported into another statute unless stated specifically in the said statute.

(v) The departments stand that the applicant had availed CENVAT credit during the period from May 2012 to December 2012 and such availment of credit disentitles them from drawback was not justified. They claimed that they were scrupulously complying with

the provisions of Rule 6 of the CENVAT Credit Rules, 2004 and relied on various judgments to contend that these judgments given when there was no provision for reversal existed in the statute become even more relevant in an era when the statute provides for methodology to determine the credit to be reversed on the inputs and input services used in or in relation to the manufacture of exempted goods. The applicants submitted that reversing the credit attributable to inputs/input services used in or in relation to the manufacture of tractors exported would be equivalent to credit not having been availed at all. They submitted that the contention that once the exporter has claimed CENVAT credit at input stage, they cannot reverse the credit subsequently and claim drawback is without merits. They also submitted a detailed worksheet of the duty attributable to the raw materials consumed in the manufacture of tractors exported in June 2012 which they contended was more than the amount of drawback claimed by them.

(vi) Rejection of claim to the extent of non-submission of Bank realization certificates evidencing the receipt of export proceeds is not correct. In this connection the Applicant submits that the Drawback benefit cannot be denied merely on account of non-receipt of BRCs towards export proceeds, as no such condition is prescribed under provisions for allowing Drawback. In this regard, the applicants referred to the decision in the case of Commissioner Vs Shyam Telecom Ltd.[2015(317)ELT 619(Tri-Del)] and P&P Overseas vs. Commissioner[2015 (317)ELT 586 (Tri-Del)], wherein, it was held that condition of receipt of export proceeds cannot be imposed to demand duty forgone in respect of the goods cleared for export under bond/LUT.

(vii) It is also submitted that since the Applicant was not able to get hold of the e-BRC printouts issued by the office of DGFT, the Applicant had furnished relevant bank statements and accounting

entries of the Applicant's financial records as evidence in support of realization of export proceeds before the authorities. However, the same has not been considered by the learned Commissioner and the claim was denied merely on account of non-production of BRC's. The Applicant submits that nowhere in the Drawback provisions it is prescribed that BRC is the only document that can evidence realization of export proceeds by the exporter. As such, the orders passed by the learned Commissioner in this regard is totally incorrect.

(viii) Rejection of Drawback on account of Waste and Scrap generated is erroneous and therefore not sustainable. The Applicants submit that i) they receive castings on payment of appropriate duty of excise but they do not avail CENVAT Credit of the duties paid thereon; ii) During the process of machining and grinding of the said castings for their fitment into engines and transmission assemblies used in Tractors, waste & scrap is generated; iii) waste & scrap thus generated is cleared on payment of appropriate duty of excise on the realizable sale value of the scrap. It is submitted that since the impugned castings had been put to use for ultimately manufacturing Tractors, which the Applicant has exported and further since Applicant had not claimed CENVAT credit of duties suffered on inputs attributable to the quantity of castings, including the waste & scrap so generated, they had claimed Drawback of the duties paid on the castings procured by them. It was therefore requested that drawback be sanctioned without reduction of waste and scrap generated.

7. The applicant had also filed supplementary claims for fixation of brand rate of duty drawback under Customs, Central Excise & Service Tax Drawback Rules, 1995 on the tractors exported during the months of May 2012 to November 2012. This supplementary claim (विशेषआवेदन) एवं वित्त अधिनियम, 1994 filed for the drawback of service tax attributable to the input services

used in or in relation to the manufacture of tractors exported in the months of May 2012 to November 2012. The Additional Commissioner of Central Excise, Mumbai-V vide her Order-in-Original No. 101/02/V/2014/ADDL/SD dated 30.04.2014 held that the supplementary claim having been filed beyond the maximum permissible time limit was hit by bar of limitation and hence rejected it.

8.1 Aggrieved by the order of the Additional Commissioner vide Order-in-Original No. 101/02/V/2014/ADDL/SD dated 30.04.2014 rejecting their supplementary claims for fixation of brand rate for the period from 30.05.2012 to November 2012, the applicant filed appeal before the Commissioner(Appeals).

8.2 Their main submissions in appeal were that they had vide their letter dated 12.06.2012 made known their intention to claim Special Brand Rate of Duty Drawback of the duty/service tax paid on inputs/input services used in or in relation to the manufacture of Tractors exported by them. Moreover, they had vide their earlier application for grant of Special Brand Rate of Duty Drawback against Tractors exported clearly declared that these applications are only for claiming duty drawback against the inputs used in the manufacture of Tractors exported and that they would be filing the claim in due course. They had also mentioned that they would be filing a supplementary/additional claim for the special brand rate of duty drawback of the service tax paid. They contended that this intimation of intention has to be treated as a formal claim for duty drawback of input services. They also placed reliance on various case laws.

9. Commissioner(Appeals) decided the appeal of the applicant vide his Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016. He referred Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and observed that the actual application for

fixation of brand rate of drawback of taxes paid on input services was filed beyond the period of one year from the date of export of the goods. Since neither the Drawback Rules nor any other provisions permitted filing of application for fixation of brand rate of drawback beyond the period of one year from the date of export, he rejected the appeal filed by the applicant.

10. Personal Hearing was held on 27.09.2018. Shri Shivdas Nair, General Manager and Shri S.S.Chari, Head GST, appeared on behalf of the applicant and filed written submissions reiterating their submissions in the revision applications and pleading that the Revision Applications be allowed. No one appeared on behalf of the department.

11. The Government has carefully gone through the relevant case records, the impugned Orders-in-Original, Orders-in-Appeal and the applicant's submissions and case laws cited by them. Since the issues involved under Order-in-Appeal No. SK/22/M-IV/2016 dated 27.06.2016 & Order-in-Appeal No. SK/06 to 17/M-IV/2016 dated 11.05.2016 are common, they are taken up together for decision. The issue involved in the revision application filed against Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016 will be dealt with thereafter.

12. The issues to be decided in the instant Revision applications filed against Order-in-Appeal No. SK/22/M-IV/2016 dated 27.06.2016 & Order-in-Appeal No. SK/06 to 17/M-IV/2016 dated 11.05.2016 are:

(i) Whether the applicant is eligible for brand rate of drawback against shipping bills on which AIR of drawback has already been claimed;

(ii) Whether drawback is allowable on inputs, used in the manufacture of export product, against which duty was debited in DEPB scrip's at the time import;

(iii) Eligibility of drawback on exports to Nepal whose proceeds are realised in other than freely convertible currency, i.e. Indian Rupees;

(iv) Whether the fact that the CENVAT credit reversed is less than drawback claimed would have bearing on the admissibility of drawback claim and whether the applicant would be required to produce the list of inputs or corresponding invoices used exclusively in export products on which they claim to not have availed CENVAT credit;

(v) Whether duty drawback can be denied to the applicant for non-submission of Bank Realization Certificates evidencing receipt of export proceeds;

(vi) Whether duty component on realisable sales value of waste and scrap arising during the manufacture of tractors can be considered for calculation of drawback amount.

13.1 The authorities below have held that since the applicant has availed All Industry Rate of drawback, they would not be entitled for fixation of special brand rate under Rule 7 of the Drawback Rules. While doing so, they have relied upon the decisions of Government of India in the case of Thermax Ltd.[2014(311)ELT 1005(GOI)], Sandvik Asia Pvt. Ltd.[2014(312)ELT 1003(GOI)] & Boards clarification vide F. No. 604/04/2011-DBK dated 31.12.2011. Government observes that the issue has received the attention of the Hon'ble High Court of Bombay in the case of Alfa Laval (India) Ltd. Vs. UOI[2014(309)ELT 17(Bom)]. The relevant portion of the judgment is reproduced hereinafter.

"23. On a careful and conjoint reading of the aforesaid Rules, we do not find that there is any prohibition set out in the Drawback Rules which debars an exporter from seeking determination of the Brand Rate of drawback under Rule 7, merely because at the time of export, he had already claimed the All Industry Rate of drawback under Rule 3. In fact, to our mind, the Rules seem to suggest otherwise. Firstly, Rule 3 which deals

with "drawback", itself stipulates when drawback is not to be allowed [see second proviso to Rule 3(1)]. Despite specifying certain situations when, drawback is not be allowed, we do not find any provision specified therein barring an exporter from seeking a determination of the Brand Rate of drawback under Rule 7, merely because, at the time of export, he applied for the grant of the All Industry Rate of drawback under Rule 3. Secondly, Rule 7 categorically provides that where in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of said goods, he may make an application within sixty days for determination of the amount or rate of drawback thereof under Rule 7, disclosing all the relevant facts and subject to the other conditions stipulated under Rule 7. The word "finds" appearing in Rule 7 after the words "manufacturer or exporter", ex facie indicates that it is only once the manufacturer or exporter comes to the conclusion that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the exported goods, can he make an application for determining the Brand Rate of drawback under Rule 7. There could certainly be instances where the manufacturer or exporter would not, at the time of export, be able to determine and/or come to the conclusion that the rate of drawback determined under Rule 3 for the specified exported goods, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the said exported goods. To cover this difference, Rule 7(1) allows the manufacturer or exporter to make an application in this regard and claim the difference, provided the rate of drawback determined under Rule 3, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services, used in the production or manufacture of the said exported goods. In other words, if the rate of drawback as determined under Rule 3 is more than 4/5th (80%) of

duties or taxes paid on the inputs/input services used, then the application made under Rule 7(1) would have to be rejected.

24. In arriving at the above conclusion, we also get assistance by what is stated in Rule 7(3). Sub-rule (3) of Rule 7 inter alia provides that where a person applies for determination of the Brand Rate of Duty Drawback under Rule 7(1), then pending the application, he may provisionally apply for being granted duty drawback as determined under Rule 3 subject to executing a bond as stipulated therein. This position is even accepted by Mr. Jetly. If we were to accept the submission of the Revenue, that once an exporter or a manufacturer was to apply for drawback at the All Industry Rate under Rule 3, he would be debarred from seeking determination of the Brand Rate of drawback under Rule 7, then no exporter at the first instance, would ever apply for drawback at the All Industry Rate determined under Rule 3, and would always apply under Rule 7(1) for seeking determination of the Brand Rate of drawback, along with an application under Rule 7(3) for the grant of provisional duty drawback at the All Industry Rate as determined under Rule 3. This could not have been the intention of the Legislature or the Central government at the time of bringing into force the Drawback Rules. There is nothing else that has been brought to our notice, either in the Customs Act, 1962 or the Drawback Rules, that could even impliedly spell out the prohibition, as sought to be contended by Mr. Jetly. We therefore hold that the manufacturer or exporter is not barred from seeking a determination of the Brand Rate of drawback under Rule 7 merely because, at the time of export, he had applied for and granted drawback at the All Industry Rate as determined under Rule 3. Our view also finds support in the language of the First proviso to Rule 3(1) and far from any prohibition in applying for Drawback in terms of Rule 7. Rule 7 comes into play only in cases where the amount or rate of drawback is low and not otherwise. The apprehension of Mr. Jetly is taken care of by the clear language of Rule 7(1) and the use of the

words "determined under Rule 3" or "revised under Rule 4". It is also taken care of by the wordings of sub-rule 3 of Rule 7.

25. Having held so, we now turn our attention to the Circular dated 30th December, 2011 issued by the C.B.E. & C. The relevant portion of said Circular reads as under :-

"2. On examining the matter it is noted that :

(a) As per Rule 7 of the Drawback Rules, 1995, if the exporter finds that the amount or rate of Drawback determined under notified AIR drawback under Rule 3 or 4 is less than four fifth of the duties and taxes suffered on inputs/input services used in manufacture of export goods, he may within specified period apply before the jurisdictional Central Excise Commissioner for determination of amount or rate of drawback (Brand Rate). Here, it must be kept in mind that the AIR drawback determined under Rule 3 or 4 of the Drawback Rules is specified in the Drawback Schedule by notification. The exporter can compare this with the facts of his case and decide if it is less than four fifth of the duties and taxes suffered and also whether he wants to apply for fixation of Brand Rate in his case.

(b) If the exporter chooses to opt for Brand Rate, then the exporter makes declaration in the Shipping Bill mentioning drawback sub serial/Tariff Item Number as 9801. Then, within the specified time from let expert date, the exporter applies for Brand Rate of drawback before the jurisdictional Central Excise authority. During the pendency of this application, the exporter may be allowed the facilitation under the Board's Circular No. 10/2003 subject to necessary conditions.

(c) After the jurisdictional Central Excise authority fixes/sanctions Brand Rate, the matter goes back to the customs at the port of export for making the requisite payment, with reference to the exporter's declaration of having opted for Brand Rate by specifying the drawback Tariff Item No. as 9801 in the Shipping Bill at the time of export. It is this option that

enables the Shipping Bill to be brought back into drawback queue for payment of Brand Rate.

(d) Thus, provisions do not provide that an exporter can avail the AIR Drawback first at the time of export under specified sub serial/Tariff Item number of the AIR schedule and then file for determination of the Brand Rate under Rule 7. Exporter's declaration of Tariff Item number other than 9801 on the Shipping bill is declaration that he is satisfied with the AIR rate and opts for it. Any other interpretation would also undermine the entire EDI procedure in this respect."

26. *On reading the Circular, and particularly Paragraph (d) thereof, it is clear that the Circular seeks to interpret the Rules to mean that an exporter once having availed the All Industry Rate of drawback at the time of export, cannot file an application for determination of the Brand Rate of drawback under Rule 7. As discussed earlier, on a plain reading of the Drawback, Rules, we do not find any such prohibition as is sought to be culled out by the C.B.E. & C. in its Circular dated 30th December, 2011. The C.B.E. & C. whilst clarifying the said Drawback Rules, has imposed limitations/restrictions which are clearly not provided for in the Rules, and has the effect of whittling down the Drawback Rules. Under the garb of clarifying the Rules, the C.B.E. & C. cannot incorporate a restriction/limitation, which does not find place in the Drawback Rules. In Clause (d) of the Circular cannot be reconciled with Clauses (b) and (c) thereof. Hence, read together and harmoniously it will have to be held that the Circular cannot override the Rules and particularly Rules 3 and 7 of the Drawback Rules and the sub-rules thereunder. This being the case, Clause (d) of the said Circular is clearly unsustainable and has to be struck down. On the same parity of reasoning, and more so because the orders/letters impugned herein, rely upon the said Circular to reject the applications of the Petitioner seeking determination of the Brand Rate of drawback under Rule 7, even the said impugned orders/letters will have to be set aside."*

13.2 Government observes that the decision of the Revisionary Authority in the case of Sandvik Asia Pvt. Ltd. has been referred by their Lordships and the clause (d) in the CBEC Circular dated 30.12.2011 was struck down. The judgment of the High Court is a binding precedent. In view of this very specific judgment of the Hon'ble High Court, the applicant cannot be denied the benefit of special brand rate of duty drawback under Rule 7 of the Drawback Rules, 1995 even if AIR of duty drawback has been claimed by them.

14.1 The Government finds that the Commissioner(Appeals) while disallowing drawback on inputs where duty had been debited through DEPB which had been used in the manufacture of exported product relied on Government of India's Order in case of Ratnamani Metals & Tubes Ltd.[2015(320)ELT 684(GOI)] holding that Notification No. 97/2009-Cus. dated 11.09.2009 limits entitlement of drawback only up to additional duty liveable and does not extend such benefit to BCD against debited DEPB scrip and also C.B.E.& C. Circular No. 41/2005-Cus., dated 28-10-2005 also clearly held that CVD paid through debit under DEPB is allowed as brand rate of drawback and not BCD paid through DEPB. He therefore held that the applicants were not eligible for benefit of Drawback under Rule 6(1)(a) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

14.2 The Governments observes that the ratio of the order of GOI in the case of Ratnamani Metals & Tubes Ltd. has been overruled by the Hon'ble High Court of Gujarat and it has been held that the duty drawback of all duties including Basic Customs Duty and Cess paid by way of debits in' the DEPB scrip's shall be allowed to exporters. In the aforesaid matter the Hon'ble High Court observed that:

"13. *It can thus be seen that the benefit of duty drawback is available in terms of Section 75 of the Customs Act, 1962 as provided in the Drawback*

Rules as specified by Government notifications from time to time. Section 75 in plain terms enables the Government of India to issue notification allowing drawback of the duty on export of goods or inputs utilised for manufacture of export goods. The drawback would be relatable to duty of customs chargeable under the Act on such imported materials.

14. *As noted, in exercise of powers under sub-section (2) of Section 75, the Drawback Rules of 1995 have been framed. In terms of Rule 3 of the said Rules of 1995, drawback is allowed on export of goods at such rates as may be determined by the Central Government. Under further proviso to Rule 3 however, such drawback would not be available in various categories specified therein. None of these categories include the payment of customs duty on the goods through DEPB scrip. In other words, Rule 3 does not prohibit a claim of drawback as per the specified rates if the duty on the imported goods is not paid in cash but by surrendering credit in the DEPB scrip. Thus neither Section 75 of the Customs Act, nor Rule 3 of the Rules of 1995, provide any restriction on claim of drawback, if the basic duty of customs is paid through DEPB.*

15. *In order to appreciate the department's concern about the customs duty not being paid when the import is made under DEPB scheme, we may broadly refer to the DEPB scheme. The scheme is framed under the import-export policy and is one of the many duty exemption or remission schemes. The scheme provides that objective of DEPB is to neutralise incidence of customs duty on import component of export product which would include special additional duty in case of nonavailment of Cenvat credit. Neutralisation would be provided by way of grant of duty credit against export product which would be at a specified percentage of FOB value of export. The holder of DEPB would have an option to pay additional customs duty in cash also. DEPB is freely transferable. The Foreign Trade Policy of 20092014 contained an additional clause which hitherto was not a part of the policy and reads as under :*

"Applicability of Drawback.
Additional customs duty/Excise Duty and Special Additional Duty paid in cash or through debit under DEPB may also be adjusted as CENVAT Credit or Duty Drawback as per DOR rules."

16. *It can thus be seen that the DEPB scheme aims at neutralising the incidence of customs duty on import component of export product, where upon export, credit would be given at specified rate on the FOB value of the exports. Such credit could be utilised for payment of duty in future or may even be traded. It was in this background that Supreme Court in case of Liberty India v. Commissioner of Incometax reported in 317 ITR 218, had held that DEPB being an incentive which flows from the scheme framed by the Central Government, hence, incentives profits are not profit derived from the eligible business (in the said case falling under Section 80IB of the Income Tax Act) and belong to the category of ancillary profits of the undertaking. Such incentive in the nature of DEPB benefit from the angle of the income tax has been seen as income of the undertaking. Thus when an importer whether imports goods under DEPB scheme or pays customs duty on the imports on purchased DEPB credits, he essentially pays customs duty by adjustment of the credit in the passbook. It would therefore, be incorrect to state that the imports made in such fashion have not suffered the customs duty.*

17. *As noted, neither Section 75 nor the Rules of 1995, prohibits entitlement of drawback when the basic customs duty has been paid through DEPB scrip. To read such limitation through the clarification issued by the Government of India in various circulars which principally touch the question of eligibility of draw back, when additional duties have been paid through DEPB would not be the correct interpretative process.*

18. *We may recall, in the circular dated 28-10-2005 it was clarified that hitherto additional customs duty paid in cash only was adjusted as Cenvat*

credit or duty drawback and the same paid through debit under DEPB was not allowed as duty drawback. However, with effect from 1-9-2004, Foreign Trade Policy provided that additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as Cenvat credit or duty drawback as per the rules. It was in this background provided that additional customs duty paid through debit under DEPB shall also be allowed as brand rate of duty drawback. Thus, the Foreign Trade Policy removed restrictions on additional customs duty being adjusted against Cenvat credit or duty drawback, unless paid in cash. A corresponding clarification was issued. This clarification cannot be seen in reverse as to eliminate the facility of draw back when basic customs duty has been paid through DEPB scrip."

14.3 The office of the Commissioner of Goods and Service Tax, Kutch, Gandhidham vide letter F No. Legal/SCA-01/2015 dated 17.10.2017 has informed that they had proposed filing of SLP before Hon'ble Supreme Court against Hon'ble Gujarat High Court's order dated 06.05.2016 in the case of Ratnamani Metals and Tubes Ltd and Jayant Agro Organics Ltd. However, Senior Analyst, Legal Cell CBEC New Delhi vide letter F.No. 276/178/2016-CX.8A, dated 21.09.2016 informed that with the approval of the competent authority it was decided not to file SLP in the subject case, as the Revenue has been adopting views that lead to conclusion that debit of BCD in the scrip is a mode of payment of that duty in lieu of cash payment of duty, since freely transferable duty credit was given in lieu of cash refund or incentive.

14.4 In the light of the judgment of the Hon'ble High Court of Gujarat, the Government observes that disallowing the drawback of duty payment made through Duty Credit Scrip's like DEPB would indirectly amount to denying the benefit of the export incentive scheme itself. Accordingly, the Government directs the original authority to consider all

such claims, wherein duty was debited in DEPB scrip on inputs, for fixation of brand rate of drawback.

15.1 The department has disallowed drawback in respect of exports made to Nepal on the ground that the export proceeds were not realized in freely convertible currency. The applicants have contended that the term 'export' as defined in the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 means taking out of India to a place outside India and since Nepal is outside India, exports made to Nepal shall be eligible for incentives provided by the Government of India.

15.2 The Government observes that any realization or repatriation of proceeds shall be as per the provisions of Foreign Exchange Management Act, 1999. Section 7 and 8 of the Foreign Exchange Management Act, 1999 provides that the export proceeds shall be realized as per the provisions of Reserve Bank of India and has to be realized in foreign exchange. Foreign currency as defined in Section 2(m) means any currency other than the Indian Currency.

15.3 The Government further finds that Rule 16A of the Drawback Rules, 1995 provides for recovery of drawback where export proceeds are not realized within the period allowed under Foreign Exchange Management Act, 1999 and the sale proceeds have to be realized in freely convertible currency. The receipt of export proceeds in a freely convertible currency is a precondition for allowing duty drawback. Therefore, the Government observes that any exports whose proceeds are not realized in freely convertible currency are not eligible for drawback.

15.4 Besides this aspect, Government observes that Notification No. 208/77-Cus. dated 1.10.1977 imposes a ban on drawback on exports to Nepal. The notification provides for certain exceptions. However, it is observed from the submissions made by the applicant that they do not

qualify for these exceptions. Since the said notification banning grant of drawback on exports to Nepal is very much in existence, the claim filed by the applicant cannot survive.

15.5 Government therefore holds that applicant's exports to Nepal are not eligible for drawback in view of the ban on drawback of duty on goods exported to Nepal under Notification No. 208/77-Cus. dated 1.10.1977. Moreover, the proceeds on these exports to Nepal were realized in Indian Currency and are therefore not entitled for benefit of Drawback.

16.1 The next issue is the ground made out concerning the observations of the Commissioner(Appeals) about the CENVAT credit availed being lesser than the drawback claimed. Government observes that the facility to export tractors under bond was discontinued from 30.05.2012. Consequently, in compliance of the requirements of Rule 6(3)(ii) of the CENVAT Credit Rules, 2004, no credit of duty/service tax paid on the inputs/input services used in or in relation to the manufacture of tractors cleared in the domestic market as well as for export could be availed. However, in view of the fact that common inputs and input services are used in or in relation to the manufacture of tractors(exempt) and parts/aggregates(dutiable), they are not in a position to segregate them as per their usage. They have therefore exercised the option under Rule 6(3)(ii); i.e. to pay an amount as determined under sub-rule (3A) of Rule 6 and have been availing credit of duty/service tax paid on the entire quantity of common inputs/input services received by them and used in or in relation to the manufacture of exempted tractors and dutiable parts/aggregates thereof, and have reversed the credit of duty/service tax attributable to the common inputs/input services used in or in relation to the manufacture of exempted tractors cleared to the domestic market and to the tractors cleared by them for export w.e.f. 30.05.2012. They have relied

judgments holding that in the event of reversal of credit attributable to inputs used in the manufacture of exempted final product, the assessee cannot be said to have availed the credit. They have pointed out that these judgments were pronounced by the courts at a time when there was no provision for reversal of credit in the statute and are therefore more relevant at a time when the statute has provided the methodology for determining the credit to be reversed on the inputs & input services used in or in relation to the manufacture of exempted goods.

16.2 In so far as availment of CENVAT is concerned, the Commissioner(Appeals) has observed that the applicant has claimed that credit has been reversed in the manner as detailed in the foregoing para only in respect of common inputs and input services consumed in their export product and that they have not availed CENVAT credit on those inputs and input services which are exclusively used for manufacture of export products. Government observes that efforts have been made by holding meetings with the applicant to sort out this issue. The applicant had then been requested to give the list of inputs exclusively used in the manufacture of the export product. However, other than their claim of not having availed CENVAT credit on inputs used exclusively in manufacture of export products, the applicant has not produced any such list of inputs or corresponding invoices in respect of such inputs to substantiate their claim of non-availment of credit.

16.3 Government observes that the provisions for calculation of the credit involved on common inputs under sub-rule (3A) of Rule 6 of the CENVAT Credit Rules are meant to resolve difficulties in cases where it is practically not possible to identify and not avail credit on inputs/input services which are commonly used in manufacture of dutiable and exempt goods and in providing taxable and exempt output services. The purpose of the insertion of the sub-rule was to alleviate the difficulties in not availing CENVAT on inputs/input services used

commonly for dutiable as well as exempt goods. If the applicant has correctly followed the procedures thereunder, the availment of CENVAT credit at the initial stage could be said to have been nullified.

16.4 It appears that the applicant has not acceded to the request of the Department to provide the list of inputs which are exclusively used in the manufacture of export product. They have not produced any such list of inputs or corresponding invoices in respect of such inputs to substantiate their claim of non-availment of CENVAT credit on such inputs. It would go without saying that the Department is well within its rights to ascertain whether the drawback is admissible and also to ensure that the applicant does not get double benefit of drawback and CENVAT credit on inputs/input services. The applicant is therefore directed to furnish a list of inputs and corresponding invoices used exclusively in the manufacture of export product. The applicant should also co-operate by providing any other documentary evidence that is required to satisfy the adjudicating authority about this aspect.

17.1 Another issue pertains to the non-submission of proof towards realisation of foreign remittance against exports made by the applicant with in the stipulated time. In terms of the provisions of Section 75 (1) of the Customs Act, 1962 read with sub-rule 16A (1) of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, where an amount of drawback has been paid to an exporter but the sale proceeds in respect of such export goods have not been realized within the time allowed under the Foreign Exchange Management Act (FEMA), 1999, such drawback amount is to be recovered. Sub-rule 16A(2) stipulates that if the exporter fails to produce evidence in respect of realization of export proceeds within the period allowed under the FEMA, 1999 or as extended by the Reserve Bank of India(RBI), the Assistant/Deputy Commissioner of Customs shall issue a notice to the exporter for production of evidence of realization of export proceeds,

failing which an order shall be passed to recover the amount of drawback paid to the claimant.

17.2 Government notes that the submissions of the applicant that there is no requirement in the provisions to deny grant of drawback where BRC's towards export proceeds has not been received are not entirely tenable. The statutory provisions under Section 75 of the Customs Act, 1962 and the Rule 16A of the Drawback Rules, 1995 provide for recovery of drawback allowed where the sale proceeds in respect of such goods has not been received within the time specified under FEMA, 1999. This procedure seeks to nullify the benefit of drawback allowed and return the applicant to the position where he had not been allowed drawback. Therefore, the importance of producing evidence in respect of realisation of export proceeds cannot be disregarded.

17.3 Government further observes that CBEC Circular No. 5/2009 dated 02.02.2009 prescribes mechanism for monitoring realisation of export proceeds. Para 5(c) of the said circular states that:
"The exporter shall submit a certificate from the Authorized Dealer(s) in respect of whom declaration has been filed containing details of the shipments which remain outstanding beyond the prescribed time limit, including the extended time, if any, allowed by AD/RBI. Such a certificate can also be provided by a Chartered accountant in his capacity as a statutory auditor of the exporter's account. A proforma for furnishing such negative statement is enclosed as Annexure. Further, the exporters also have the option of giving a BRC from the concerned authorized dealer(s)"
As per the Board circular a periodical six monthly statement has to be furnished by the exporters at the end of every six months for the exports made during the preceding period.

17.4 However, it appears from the orders of the authorities below, that the drawback claims in respect of certain exports have been summarily rejected in view of the non-submission of BRC's. In the present case, BRC's in respect of certain exports were not produced by the applicant before the adjudicating authority as well as the appellate authority. The provisions of Section 75(1) of the Customs Act, 1962 and Rule 16A of the Drawback Rules, 1995 provide for recovery of drawback if the export proceeds are not received within the time allowed under FEMA, 1999. Government observes that these provisions of Customs Act, 1962 and the Drawback Rules, 1995 come into play after sanction of the drawback claims. Sub-rule (4) to Rule 16A of the Drawback Rules, 1995 also provides for repayment of drawback amount recovered by the Department on production of evidence after subsequent realization of export proceeds. In the present case, the authorities have rejected the drawback claim for non-receipt/failure to produce BRC's. The implication of such action is that in the event of the applicant subsequently coming forward with evidence of realization of export proceeds, the Department would have to pay the drawback amount forthwith. The correct course of action would be that the Department should comprehensively examine the drawback claim and conclude whether the claim is admissible or otherwise. In case the drawback is otherwise admissible, the Department can go into the aspect of whether the export proceeds have been received within the time allowed under the relevant provisions and retain the sanctioned amount if the export proceeds have not been received. The implication of having a practice where the drawback is rejected only for non-production of BRC's is that it would be obligatory for the Department to pay the amount claimed as drawback whenever the applicant comes forward with evidence of realization of export proceeds in terms of Rule 16A(4) of the Drawback Rules, 1995.

17.5 In view of the above findings, the Government holds that the adjudicating authority should examine the drawback claims for

admissiblilty in its entirety and then delve into the aspect of whether the export proceeds have been realized or otherwise. Wherever the applicant has submitted copies of bank realisation certificates as proof towards realisation of export proceeds within the periods stipulated under Rule 16A of the Drawback Rules, 1995, all such cases shall merit consideration for sanction of duty drawback. Accordingly, Government directs the Original Adjudicating Authority to verify the drawback claims and consider the documentary proof submitted by the applicants towards realisation of foreign remittance in respect of drawback claims under question.

18.1 Another point to be determined is whether the duty component on realisable sales value of the waste and scrap generated during the manufacture of tractors is required to be reduced from the total drawback claim. The applicants contention is that in so far as the inputs i.e. castings used in the manufacture of export goods are concerned, they have not availed CENVAT credit and therefore the duty amount paid on the waste and scrap generated should not be deducted for calculation of drawback. They have further argued that while granting CENVAT credit under CENVAT credit rules, either the value or duty paid on such scrap is not excluded.

18.2 Government observes that the Board has issued a circular no. 108/2003-Cus. dated 17.12.2003 issued vide F. No. 603/32/2003-DBK giving detailed instructions for brand rate fixation in cases of recoverable waste. It was clarified that Rule 3(2)(d) provides for incorporation of average amount of duties paid on materials wasted in the process of manufacture and in terms of the proviso to this rule, if any waste is sold, the average amount of duties on the waste so sold is to be deducted. The circular also contains an illustration for computation of drawback where recoverable waste is involved. It is observed from the

orders of the original authority that due cognizance of these instructions has been taken.

18.3 Rule 7 of the Drawback Rules provides for determination of the amount or rate of drawback in proportion to the materials or components or input services used in the production or manufacture of goods and the duties or taxes paid on such materials or components or input services and therefore, the determination of drawback shall take into account all relevant factors including the recoverable and non-recoverable waste. Therefore, the Government opines that any value of the recoverable waste or scrap is to be deducted from the input value. Accordingly, any such duty component on scrap or waste shall not be computed for calculation of drawback. The Government fully concurs with the findings of the Commissioner (Appeal) that in respect of recoverable waste or scrap, the inputs to the extent of such scrap or waste cannot be said to have been used in the manufacture of export goods.

19. In view of the above discussion and findings, the Order-in-Appeal No. SK/06 TO 17/M-IV/2016 dated 11.05.2016 & Order-in-Appeal No. SK/22/Mum-IV/2016 dated 27.06.2016 passed by the Commissioner of Central Excise (Appeals), Mumbai are modified to the above extent. The Revision Applications filed against the two Orders-in-Appeal are disposed off in the above terms.

20. The last issue that is to be decided is the aspect of time bar in case of drawback claims referred to as "supplementary claims" filed by the applicant for the input services involved in the manufacture of tractors which have been exported during the period between 30.05.2012 to November 2012 covered under the revision application filed against Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016. The factual matrix of the case is that the drawback claim has been filed

8.11.2013(received on 12.11.2013) for the input services used for the manufacture of export goods during the period between June 2012 to November 2012.

21.1 Government observes that vide their letter dated 12.06.2012, the applicant had communicated their intent to avail drawback of central excise duty paid on inputs as well as the service tax paid on input services. They had also submitted that they were not in a position to separately account for the inputs and input services used in or in relation to the manufacture of aggregates; i.e. I.C. Engine, transmission assembly and sheet metal parts used captively in the tractors cleared for home consumption and for export and similarly for the manufacture of aggregates being cleared for home consumption since majority of the inputs and input services were common for such finished goods. It was stated that it was impossible for them to ascertain the end use of such inputs and input services at the time of their receipt.

21.2 Thereafter, the applicant has while filing drawback claims in their letters from 1.02.2013(claim for 30.05.2012 to 30.06.2012) onwards informed the Commissioner of Central Excise that they would require additional time for submitting data for scrutiny by the drawback sanctioning authority in respect of service tax paid on input services used in the manufacture of tractors. The letters are dated 15.03.2013, 20.06.2013, 31.07.2013, 18.09.2013 & 20.05.2013 for the months of July 2012, August 2012, September 2012, October 2012 and November 2012 respectively. Each and every letter contains a paragraph stating that the claim is only for inputs used in the manufacture of tractors and that the applicant would be filing a supplementary claim for drawback of service tax paid on services used in the manufacture of tractors exported w.e.f. 30.05.2012. Incidentally, there is no mention of the rule under which the drawback is proposed to be filed in the related paragraph. Thereafter, the applicant has filed the supplementary claim vide their

letter dated 8.11.2013, (received in the Office of the Commissioner of Central Excise, Mumbai-V on 12.11.2013) for the months of June 2012 to November 2012. It is observed that there is no supplementary claim for drawback of tractors exported on 30/31.05.2012.

21.3 The original authority has recorded findings holding that the claims filed by the applicant vide their letter dated 8.11.2013(received on 12.11.2013) were not supplementary claims under Rule 15 of the Drawback Rules, 1995. She has gone on to examine them for limitation in the time frame specified under Rule 7 of the Drawback Rules, 1995 and since the exports have been effected during the period between June 2012 to November 2012 held that the claim is time barred. On the other hand, the Commissioner(Appeals) has considered the claim filed for drawback in respect of input services under Rule 7 of the Drawback Rules, 1995 and held it as barred by limitation.

21.4 Government has carefully gone through the letters filed by the applicant from 12.06.2012 onwards. The applicant has set out the facts and explained their position vis-à-vis the changed position due to the rescinding of Notification No. 18/2012-CE dated 17.03.2012 by Notification No. 27/2012-CE dated 30.05.2012 which prevented them from exporting under bond and claiming CENVAT credit of the duty paid on inputs and input services used in or in relation to the manufacture of tractors exported w.e.f. 30.05.2012. They have submitted that they intend to claim duty drawback and explained their difficulty in filing claims on the component of service tax suffered on input services received by them.

21.5 The applicant has repeatedly made mention of their intention to claim drawback of service tax paid on input services received by them. In the revision applicant filed, the applicant has sought to draw attention to the amplitude of Rule 15 of the Drawback Rules, 1995. Government

observes that the authorities below have held that the provisions of Rule 15 of the Drawback Rules, 1995 would not be applicable to the claim filed by the applicant in respect of input services on the ground that none of the situations entailed in the rule have come to pass in the present case.

21.6 In the circumstances, it is imperative that the scope of Rule 15 of the Drawback Rules, 1995 be examined. The relevant portion of the text of the Rule is reproduced hereinafter.

"15. Supplementary claim. *- (1) Where any exporter finds that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount or rate of drawback determined by the Central Government or Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, he may prefer a supplementary claim in the form at Annexure III :*

Provided that the exporter shall prefer such supplementary claim within a period of three months, -

(i) Where the rate of drawback is determined or revised under rule 3 or rule 4, from the date of publication of such rate in the Official Gazette;

(ii) Where the rate of drawback is determined or revised upward under rule 6 or rule 7, from the date of communicating the said rate to the person concerned;

(iii) in all other cases, from the date of payment or settlement of the original drawback claim by the proper officer.

(2) Save as otherwise provided in this rule, no supplementary claim for drawback shall be entertained."

21.7 It is noted from the text of the Rule 15 that it applies to a case where the exporter "finds" that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount or rate of drawback determined by the Central Government or Commissioner of Central Excise or the Commissioner of Customs and Central Excise,

the case may be, he may prefer a supplementary claim. The threshold for applicability of this rule is the coming to knowledge or the point in time that they discover the fact that the drawback paid to them is less than what they are entitled to on the basis of the amount or rate of drawback determined by the Central Government or the Commissioner of Central Excise. The crucial words here are "finds" and "paid to them". In other words, the rule pictures a situation where the applicant realizes that the amount of drawback paid to them is less than what they are entitled to. It would be obvious that to "find" that the amount of drawback "paid to them" was less than what they were entitled to on the basis of the amount or rate of drawback determined by the Central Government or the Commissioner of Central Excise, such claim should have been before that authority for decision. In a manner of speaking, the option of filing a supplementary claim is a means for an aggrieved claimant of drawback to seek their legitimate entitlement vis-à-vis the claim they had failed and which was not determined to their satisfaction.

21.8 In the present case, the facts are different. The applicant had filed the original drawback claims only in respect of inputs used in the manufacture of tractors which they had exported. At the point in time when the claim for brand rate of drawback in respect of input services was filed by the applicant, the claim in respect of the inputs had not been sanctioned. Thereafter, on rejection of certain portion of their drawback claim by the drawback sanctioning authority, the applicant had preferred appeal before the Commissioner(Appeals). The applicant did not file a supplementary claim in respect of the original drawback claims filed by them but had instead preferred appeal before the Commissioner(Appeals).

21.9 As per the provisions of Rule 15 of the Drawback Rules, 1995, the applicant, if the amount or rate of drawback determined was found to be less than what they were entitled to, the applicant could prefer a supplementary claim. As such, the applicant did not have reason

to file a supplementary claim as they were aggrieved by the rejection of certain parts of the drawback claims filed by them and not by the amount/rate of drawback claims determined. In the facts of the present case, the input services received by the applicant and utilized for the manufacture of the tractors were not part of the original claim. Therefore, there is no occasion for filing supplementary claims in respect of such input services which did not figure in the original drawback claims filed by the applicant.

21.10 The drawback claims filed by the applicant for the input services used in or in relation to the manufacture of the said exported tractors for the months of June 2012 to November 2012 which have been referred to as "supplementary claims" are in fact new claims separate from the original claims filed by the applicant. The span of Rule 15 of the Drawback Rules, 1995 cannot be extrapolated to such an extent that they can include a new claim which was not forming part of the original claim. In the circumstances, bereft of the title of "supplementary claim" that the applicant has couched these claims in, what remains is an independent claim for fixation of brand rate of drawback in respect of input services utilized in the manufacture of tractors. The applicant has claimed that they were faced with technical difficulties due to the abrupt rescinding of Notification No. 18/2012-CE dated 17.03.2012 by Notification No. 27/2012-CE dated 30.05.2012. Be that as it may, the words of the statute are binding and the drawback sanctioning authority could have considered the claim for input services as a supplementary claim only if they were forming part of the drawback claim originally filed by the applicant.

21.11 The contentions of the applicant that the letters filed by them mentioning that they would be filing "supplementary claims" cannot come to their rescue. Filing a letter by which they claim to do a thing which is beyond the scope of the rules would not legitimize that action.

The letter or any other communication cannot be seen to do away with the bar of limitation under the statute. Moreover, these sentences in the letters submitted while forwarding drawback claims for different months did not mention the rule under which these claims for service tax paid on services used in manufacture of tractors w.e.f. June 2012 were proposed to be filed. The claims for fixation of brand rate of drawback in respect of input services was not covered under the drawback claims originally filed by the applicant and therefore did not qualify as supplementary claims.

21.12 In the present case, the drawback claim in respect of input services for the period from June 2012 to November 2012 was being filed for the first time on 8.11.2013(received on 12.11.2013). It was clearly a new claim for special rate of brand rate under Rule 7 of the Drawback Rules, 1995 and therefore the time limits for filing new claim under Rule 7 would apply to the said claim. In the present case, the drawback claim has been filed beyond the maximum period of one year including the extensions permissible by the jurisdictional authorities. As held by the courts time and again, there shall be no departure from the words of the statute. The maximum period for filing a claim under the Drawback Rules, 1995 is one year and therefore the claim filed by the applicant is time bound.

21.13 The applicant has also raised some contentions regarding the powers vested in the Central Government under Rule 17 of the Drawback Rules, 1995 to exempt an exporter or agent from the provisions of the Drawback Rules where it is satisfied that the exporter or his agent had failed to comply with any of the provisions of the rules due to reasons beyond the control of such exporter or his agent. The Government agrees that these powers would enable the exemption of the exporter or agent from the provisions of the Drawback Rules and could enable the condonation of the delay in excess of the maximum statutory period of one year under Rule 7 of the Drawback Rules, 1995. However, the

powers are vested in the Joint Secretary(Drawback) and not in the Revisionary Authority. In this regard, reliance is placed upon the decision of the Government of India in the case of Cummins India Ltd.[2016(343)ELT 759(GOI)] wherein the authority vested with powers to be exercised under Rule 17 of the Drawback Rules, 1995 has been identified as the Joint Secretary(Drawback). The relevant paras of the said case law are reproduced below.

"20. *Central Government is an entity which comprises separate and distinct arms through which it discharges its multifarious functions. The term does not necessarily refer to a single authority. Further, the respective authorities discharge their functions only as per the specific statutory provisions, which as a general rule cannot be exercised inter-changeably. Under the Customs Act, 1962 or Rules issued thereunder also, the Central Government's powers are exercised by different authorities based among other on the executive or quasi-judicial function being performed.*

21. *The powers of revision of the Central Government under the Customs Act, 1962 are prescribed under Section 129DD, which reads as below :*

"Revision by Central Government *- (1) The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order :*

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

Explanation. - For the purposes of this sub-section, "order passed under section 128A" includes an order passed under that section before the commencement of section 40 of the Finance Act, 1984, against which an appeal has not been preferred before such commencement and could ha

been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

(1A) The Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

(2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made :

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3) An application under sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of -

(a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is one lakh rupees or less;

(b) one thousand rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is more than one lakh rupees :

Provided that no such fee shall be payable in the case of an application referred to in sub-section (1A).

(4) The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

(5) No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section, -

(a) in any case in which an order passed under section 128A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value, and

(b) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

(6) Where the Central Government is of opinion that any duty of customs has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in section 28."

22. *From a perusal of the above Section, Government observes that the revisionary powers are specific, quasi-judicial in nature and restricted to the confines of the Section i.e. to be exercised through the revisionary authority only in cases of orders passed by Commissioner (Appeals) under Section 128A of the Act with reference to cases as specified in the first proviso to sub-section (1) of Section 129A. The fact that Government under Section 129DD performs quasi-judicial function is further reinforced by Hon'ble Supreme Court's judgment in the case of Indo-China Stream Navigation Co. Ltd. v. Jasjit Singh, Additional Commissioner of Customs - 1983 (13) E.L.T. 1392 (S.C.) wherein it has been held that status of a Tribunal is accorded to the Central Government in its capacity as a revisionary authority.*

23. *Therefore, Government holds that the powers given under Rule 17 ibid are beyond the scope of powers to be exercised under Section 129DD of the Act. As such mention of Central Government in Rule 17 ibid does not*

refer to Joint Secretary, Revision Application or empower him on behalf of Central Government for the purpose of Rule 17 ibid.

24. *Government further notes that the following case laws lend support to the view that the power to grant relaxation under Rule 17 does not vest with the Revisionary Authority.*

24.1 *The Hon'ble High Court of Bombay at Panaji in the case of IFB Industries Ltd. v. Union of India - 2007 (215) E.L.T. 497 (Bom.) has held as under :*

"2. This petition impugns an order passed by Respondent No. 4 and seeks declaration that the said order is nullity. It seeks further direction to the competent authority to decide the matter in dispute, after granting personal hearing in accordance with the direction given by this Court in terms of prayer (b) to the earlier petition, filed by the petitioner in this Court, being Writ Petition No. 398 of 2006. Earlier petition bearing Writ Petition No. 398 of 2006 [2007 (211) E.L.T. 366 (Bom.)] was disposed of at the stage of admission by an order of the Division Bench of this Court dated 6-11-2006. Subject matter of the said petition pertained to the rejection of an application for fixation of Brand Rate of duty drawback under Rule 6(1)(a) of the Customs and Central Excise Duties Drawback Rules, 1995. It was the contention of the Petitioner that in the earlier petition, Respondent No. 2 i.e. Joint Secretary (Drawback), the Directorate of Drawback, Ministry of Finance was the competent authority vested with the powers to condone delay in filing of such an application and in spite of such application being made to him, the Respondent No. 4 had wrongly passed the impugned order dated 12-2-2007. It appears that at the stage of hearing for admission, Central Government Standing Counsel appearing for Respondents No. 1, 3, 4 and 5 in the said petition had submitted that if this Court so directed, the competent authority would hear the petitioner's application afresh for condonation of delay and pass appropriate orders.

The petition was therefore allowed in terms of prayer clause (b) which reads as under :

"In the alternative this Hon'ble Court may be pleased to set aside the order conveying rejection of the petitioners' request for condonation of delay and direct the competent authority by a writ of mandamus or any other writ or direction or order to hear and decide such request afresh after granting a personal hearing."

3. The competent authority was directed to dispose of the application for condonation of delay within a period of three months. It appears that after the judgment of High Court in the earlier Writ Petition, the papers were sent to the competent authority. Instead of deciding the matter of condonation of delay afresh the competent authority vide letters dated 22-12-2006 and 15-1-2007, without hearing the petitioner, communicated certain directions to the present Respondent No. 4. The said directions are reproduced in paragraph three of the impugned order dated 12-2-2007 and from the same, it is evident that the competent authority has decided the matter relating to condonation of delay against the petitioner on merits.

4. The procedure followed by the competent authority is not correct and is also not in accordance with the directions given by this Court. In fact, if such directions were given to the subordinate officer, then the said officer would have no discretion except to act in accordance with the directions given to him and this is exactly what he has done while passing order dated 12-2-2007. Needless to say that the hearing given by Respondent No. 4 to the petitioner, was not a hearing given by the competent authority as contemplated by the judgment and order passed by this Court in the earlier Writ Petition.

5. In the circumstances, Rule is made absolute in terms of prayer clause (a) of this petition. It is directed that the competent authority will give a hearing to the petitioner and will decide the petitioner's application for condonation of delay dated 9-11-2005".

24.2 *The Hon'ble CESTAT in the case of Kuber Engineering Enterprise v. Commissioner of Central Excise, Kolkata-III - 2009 (234) E.L.T. 542 (Tri.-Kolkata) and in the case of Process Equipments and Vessels Eng. Co. Ltd. v. Commissioner of Central Excise, Kolkata-III - 2009 (233) E.L.T. 538 (Tri.-Kolkata) held that :*

"What the appellants are seeking is the Central Government's power to relax, under Rule 17 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the period of delay in submitting the Brand Rate Application. Such an Application for relaxation under Rule 17 should be submitted by the Appellants to the Central Government through the Joint Secretary, Drawback in the Ministry".

24.3 *Further, the Revisionary Authority while holding supplementary drawback claim filed after 17 months from date of settling of claim as hit by limitation in the case of Steel Authority of India - 2014 (311) E.L.T. 1016 (G.O.I.) had held as under :*

"The respondent has finally argued that Central Government may condone the delay in terms of Rule 17 of Drawback Rules. In this regard, Government observes that respondent was required to seek such condonation of delay from designated proper authority in Central Government. Respondent has not produced any such condonation of delay approval from competent designated authority and therefore no relief can be granted by revisionary authority who is exercising powers only under Section 129DD of Customs Act, 1962".

24.4 *The above case laws thus also establish that the Central Government's power to relax under Rule 17 ibid can only be exercised through the Joint Secretary, Drawback, in the Ministry and not the revisionary authority.*

25. *Further, Government observes that the Commissioner (Appeals) exercises quasi-judicial authority under Section 128A of the Custom[illegible]*

1962 being the first level of appeal against orders passed by officers lower in rank than a Commissioner of Customs. It would thus be beyond the scope of the powers conferred by the said Section for the Commissioner (Appeals) to exercise authority under a Section or a Rule for which he is not empowered. Hence, Government holds that in allowing relaxation under Rule 17 ibid, the Commissioner (Appeals) has exceeded his statutory jurisdiction.

26. *Government also holds that the provisions of Rule 17 ibid cannot be invoked either at the stage of Commissioner (Appeals) or in the present proceedings in Revision. In the present case, it is a fact on record that there is no condonation of delay application either before original authority under Rule 15 or such a representation before the competent authority under Rule 17. Relaxation under Rule 17 should have been invoked before the competent authority prior to filing of supplementary claim. The respondent has not produced any condonation of delay from the competent designated authority. Moreover, no relief under Rule 17 can be given by the Commissioner (Appeals) or by the revisionary authority who are circumscribed by way of exercise of their powers under Sections 128A and 129DD of the Customs Act, 1962 respectively."*

21.14 In the light of the detailed exposition in the case law cited above, the proper avenue for the applicant to seek condonation of delay in filing the claim of brand rate of drawback in respect of input services after the passing of maximum statutory period was the Joint Secretary(Drawback). The applicant in the present case has failed to approach the Joint Secretary(Drawback) for such condonation before filing the Revision Application for fixing brand rate of drawback in respect of input services used in the manufacture of tractors which they had exported and therefore their claim is barred by limitation. The case laws cited by the applicant to buttress the contention that the date of the original claim was filed should be treated as the date of the filing of claim in respect of input services are distinguishable on facts. The case law of

Shasun Chemicals & Drugs Ltd.[2010(254)ELT 346(Trb)] was in respect of a refund claim where supplementary claim was filed. The situation with regard to drawback claims under the Drawback Rules, 1995 is different since the present claim is clearly not a "supplementary claim" under Rule 15 thereof. Similarly, the case law of Arunoday Mills Ltd.[2003(156)ELT 790(Trb)] involves a situation where there was a deficiency in the refund claim originally filed and the applicant had filed a revised claim within the limitation period of six months. The revision application filed by the applicant against Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016 is therefore liable to be rejected.

22. In the light of the observations recorded hereinbefore, Government orders that:

(i) The claims rejected for claiming brand rate of drawback where All Industry Rate of Drawback has already been claimed are directed to be examined and decided on merits;

(ii) The claims for drawback of customs duties(BCD) paid by debit in DEPB scrips on imported inputs used in the manufacture of exported tractors are directed to be examined and decided on merits;

(iii) The duty drawback claimed in respect of tractors exported to Nepal are held to be inadmissible and hence rejected;

(iv) The applicant is directed to furnish a list of inputs and corresponding invoices used exclusively in the manufacture of export product. The applicant should also co-operate by providing any other documentary evidence that is required to satisfy the adjudicating authority that the drawback being claimed is not excessive or resulting in double benefit of CENVAT to the applicant;

(v) The adjudicating authority should examine the drawback claims for admissiblilty in its entirety and then delve into the aspect of whether the export proceeds have been realized or otherwise;

(vi) The order of the Commissioner(Appeals) reducing the drawback claim filed by the applicant on the grounds of duty attributable

waste and scrap generated in the course of manufacture of export goods is upheld;

(vii) The Order-in-Appeal No. SK/18/M-IV/2016 dated 12.05.2016 rejecting the drawback claim for fixing brand rate on input services used in the manufacture of tractors exported by the applicant as timebarred is upheld.

23. The drawback sanctioning authority is directed to examine and decide the drawback claims in terms of the directions at (i), (ii), (iv) & (v) within ten weeks from the date of receipt of this order.

24. The impugned fourteen Revision Applications filed by the applicant are disposed off in the above terms.

25. So ordered.

30.11.18

(ASHOK KUMAR MEHTA)
Principal Commissioner &
Ex-Officio Additional Secretary
Government of India

1086-1099
ORDER No. /2018-CUS(WZ) /ASRA/ dated 30.11.2018

To,
M/ s. Mahindra & Mahindra Ltd.,
Akruli Road, Kandivali (East),
Mumbai-400101

Copy to:
1. The Commissioner, Central Tax, Thane
2. The Commissioner(Appeals), Central Tax, Thane
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