F.No. 195/129-130/12-RA
F.No. 198/30-31/12-RA

REGISTERED
SPEED POST

F.No. 195/129-130/12-RA
F.No. 198/30-31/12-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 07/2/14

ORDER NO. 12-15/14-Cx DATED 28.01.2014 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D.P.SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject	:	Revision application filed under Section 35 EE of the Central Excise Act, 1944 against the orders-in-appeal passed by Commissioner of Central Excise (Appeals-II), Mumbai as mentioned in column No.3 of table in para 1 of this order
Applicant	:	(1) M/s Chemagis India Pvt. Ltd., Mumbai (2) M/s Dy-Mach Pharma, Mumbai (3) Commissioner of Central Excise, Navi Mumbai
Respondent	:	(1) Commissioner of Central Excise, Navi Mumbai (2) M/s Chemagis India Pvt. Ltd., Mumbai (3) M/s Dy-Mach Pharma, Mumbai

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ORDER

These revision applications are filed by applicants against the orders-in-appeal passed by the Commissioner of Central Excise (Appeals-II), Mumbai with respect to orders-in-original passed by the Deputy Commissioner of Central Excise (Rebate), Raigarh as detailed below:.

Sl. No.	R.A.No.	Order-in-appeal No. & date	Name of the applicants	Name of the respondents	Rebate claim sanctioned as per O-I-O (Rs)	Rebate amount disputed by department (Rs)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1	F.No.195/129/12-RA	US/414-416/RGD/11 dt. 17.11.11	M/s Chemagis India Pvt. Ltd., Mumbai	Commissioner of Central Excise, Navi Mumbai	1691775	———
2	F.No.198/30/12-RA	US/414-416/RGD/11 dt. 17.11.11	Commissioner of Central Excise, Navi Mumbai	M/s Chemagis India Pvt. Ltd., Mumbai	1691775	55661
3	F.No.195/130/12-RA	US/414-416/RGD/11 dt. 17.11.11	M/s Dy-Mach Pharma, Mumbai	Commissioner of Central Excise, Navi Mumbai	353908	———
4	F.No.198/31/12-RA	US/414-416/RGD/11 dt. 17.11.11	Commissioner of Central Excise, Navi Mumbai	M/s Dy-Mach Pharma, Mumbai	353908	1975

2. Brief facts of the cases are that the original authority sanctioned the rebate claims with reference to M/s Chemagis India Pvt. Ltd. and M/s Dy-mach Pharma. The department filed appeal before Commissioner (Appeals) on the ground that the rebate claims to the tune of Rs.55661/- and Rs.1975/- were wrongly sanctioned. It was contended in the appeals that the value declared in the ARE-1 was more than the FOB value declared in the Shipping Bills. The value declared in the ARE-1 was more, which was not the correct transaction value and the duty amount paid on the said excess value was not admissible as rebate. The transaction value as per Section 4 of Central Excise Act, 1944 is the value at which goods are sold but does not include freight and insurance. The Commercial invoice value is the value at which goods are sold. Therefore, the value after deducting freight and insurance from commercial invoice value (which is equal to FOB value) should be the transaction value for the purpose of Section 4 of Central Excise Act, 1944. The difference in the

value of the goods shown in the ARE-1 and the FOB value shown in the invoice is arrived after reducing the Freight and Insurance charges (if any) from the Commercial value. The excess amount paid on ARE-1 value over and above FOB value is not the duty of Central Excise but it is to be treated as "Excess Payment". The Rebate in terms of Rule 18 of Central Excise Rules, 2002 is the rebate of Central Excise duty paid on the exported goods. Hence, the sanction of rebate of such "Excess payment" is in violation of Rule 18 of Central Excise Rules, 2002. Commissioner (Appeals) allowed appeals filed by the department and set aside the entire impugned orders-in-original.

3. Being aggrieved by the said orders-in-appeal, the department as well as parties have filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:

3.1 Grounds of Revision Application No. F.No.195/129/12-RA & F.No.195/130/12-RA filed by M/s Chemagis India Pvt. Ltd. and M/s Dy-Mach Pharma:

3.1.1 The Revisionary Authority, Government of India has ruled in case of Sterlite Industries as well as SPL Industries that duty paid on exports on transaction value, which includes freight & insurance is to be rebated. The said decision is binding as the same is not varied/reversed by any higher authority. The Revisionary Authority, GOI cannot deride its own decision. It cannot be the case of the RA, GOI that the law is different for big cases like Sterlite & differed interpretation prevails in the case of small exporters. The judicial discipline needs to be maintained. The CESTAT has ruled in umpteen cases in case of rebate that freight & insurance are part of the transaction costs & the said decisions have not been reversed by any higher authority. Once again, as per the settled principles of law the decision is binding & judicial discipline needs to be observed.

3.1.2 The assessment/certification by the jurisdictional authority cannot be varied without being challenged. However, even this settled principle of law by the Apex Court is being derided, which is contempt of law as laid down by the apex court.

The CBEC circular No.510/06/2000-Cx dated 3.2.2000 says that the duty element shown on AR-4 has to be rebated, if the jurisdictional Range officer certifies it to be correct. The CBEC circular is also clear that there is no question of re-qualifying the amount of rebate by the rebate sanctioning authority by applying some other rate of exchange prevalent subsequent to the date on which the duty was paid. Therefore, once the jurisdictional Excise official has authenticated the triplicate copy of the ARE-1, the assessment procedure stands completed. The CBEC circular also says that if the rebate sanctioning authority has reasons to believe that duty has been paid in excess than what should have been paid, he shall inform, after granting the rebate, the jurisdictional Assistant/Deputy Commissioner. The language of the CBEC circular is unambiguous & leaves no room for interpretation. The said circular was brought to the notice of the Commissioner (Appeals) & the same is simply recorded in the order but no findings are given or why the said circular need not be followed by the field formation! The adjudicating authorities cannot circumvent the issues raised in this manner, which are against the department.

3.1.3 The circular issued vide F.No.M.F.(D.R.) F.No.354/81/2000-TRU, dated 30.6.2000 clearly states that "However, exclusion of cost of transportation is allowed only if the assessee has shown them separately in the invoice and the exclusion is permissible only for the actual cost so charged from his buyers." Therefore exclusion of the freight is conditional & the freight cannot be excluded if the condition is not met as per the law & there cannot be any distinction permissible in terms of type of freight as the law does not provide for it. Please note that the law has to be read the way it is written. Alternatively speaking the transaction value is what the buyer pays in the exchange of goods therefore if the freight is included in the C&F payment by the buyer & insurance & freight is included in the CIF contract then because they are not shown separately in the invoice, the same cannot be excluded for the purpose of the payment of duty as the same constitutes transaction value in terms of the law. There are no two ways about it. No sane mind can deny that freight & insurance are expenses directly related to the sale of goods & the law does not say that insurance cost has to be excluded.

3.1.4 The difference between ARE-1 value & FOB value is freight & insurance is simply a presumption/assumption/figment of imagination of the lower adjudicating authority & such unsubstantiated statements are of no value. Just see the freight & insurance amount & the difference being objected by the department. The fact is clear that the amount objected to by the department is not equal to the freight & insurance payable on the transaction. Please note that under the Customs Act, 1962, the FOB value of the export goods is assessable under S 14 of the Customs Act. Here in this case, to arrive at the FOB value of exports the law prescribes that the exchange rate declared by the customs department under the customs notification has to be used to arrive at the FOB value of exports. The S/Bs take the Exchange rate applicable as on the date of the Let Export Order. However, there is no such corresponding provision in the Central Excise law. Therefore, it is not necessary that FOB value of export in the S/B will be the assessable value under ARE-1 for the payment of duty. The Appellate Authority will kindly note that even in the FOB contracts the ARE-1 Value does not tally with the FOB value of exports. In FOB contracts, there is no freight & insurance to be subtracted then the difference between the ARE-1 assessable value & the FOB value given in the S/B cannot arise on account of freight & insurance! The CBEC circular of 1996 says has already clarified that AR4 assessable value & S/B FOB value need not be the same. Therefore, until & unless the Rebate sanctioning authority is definitely able to establish the reason for the difference, the rebate sanctioning authority cannot bring about a case against the rebate claimant on the wrong premise that the difference between FOB value of exports given in the S/B & the assessable value given in the ARE-1 is the freight & insurance element. More so, when the transaction value can include any charges, in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time therefore the definition is very wide to include several other charges such as storage, sample testing etc. The freight & Insurance are related to the sale & cannot be excluded if not shown separately.

3.1.5 Please note that FOB value given in the S/B is only for the purpose of collection of export statistics as the same is estimated value. Therefore, this S/B value cannot be treated as FOB value for the purpose of assessment of duty. If the FOB value of exports given in the S/B is true value of the transaction then all the export incentives will be disbursed on this value but that is not the case. Therefore the FOB value in the S/B is only indicative & cannot be relied upon as transaction value in terms of the C.Ex.Act. This was brought to the attention of the Commissioner (Appeals) but then this does not even find mention in the order in appeal. Once again, the department is bound by the CBEC circular.

3.1.6 The order passed in case of Shri Bhagirathi Textiles Ltd., 2006 (2002) ELT 147 (GOI) has been discussed at length & it is concluded that case has no bearing in cases where the foreign exchange is realized in full as per the declaration made by the exporter. Therefore citation of Bhagirathi Textiles by the appellant is of no value.

3.1.7 In the case law 2010 (259) E.L.T. 369 (Bom.) in case of Maharashtra Cylinders Pvt. Ltd. versus CESTAT, MUMBAI wherein the hon'ble Mumbai High Court has ruled that Question of refund of duty paid not arises in self-assessment cases where goods are cleared under self-removal procedure unless self-assessment is varied - Supreme Court ruling in Priya Blue Industries case [2004 (172)E.L.T. 145 (S.C.)] holding validity of assessment cannot be considered in refund claim, applicable to self-assessment cases also - Self-assessment could be challenged by filing appeal - Impugned order holding refund claim as hit by time bar, sustainable. This effectively means that even if the department concedes only to the extent that there was self-assessment carried out & the verification of the ARE-1 is simply a ritual or the Range officials are not required to perform the duties specified under the CBEC circular then too they were required to challenge the self-assessment to overcome the limitation placed by the self-assessment to vary the rebate amount stated in the ARE-1 duly certified by the Range officials. The judgement is squarely applicable to the present case. Therefore without challenging the self-assessment, there is no way that the assessment carried out in the ARE-1 can be varied.

Therefore the citation of M/s Gimatex Industries Ltd. Vs CCE Nagpur 2010(261) E.L.T.1026 (Tri-Mumbai)] & Nagpur Transwell power Pt. Ltd. Vs CCE, Nagpur 2009 (243) ELT 459(T) are of no value.

3.1.8 "Free on Board" means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FCA term should be used. The other definitions of C&F & the CIF are not reproduced for the sake of brevity but the sellers responsibility to deliver the goods under the ships rail remains as it is under these categories of shipments also. Therefore, the undisputable fact remains that under FOB/C&F/CIF, the responsibility rests on the seller to deliver the goods cleared for export at the named port of shipment. Even in case of Air shipment the term to be used is FCA, which means that the goods are to be delivered to the carrier at the named place for shipment.

3.2 Grounds in Revision Application No.198/30/12-RA & 198/31/12-RA (OIA No.US/414-416/RGD/11 dated 17.11.11):

3.2.1 The Commissioner (Appeals), by setting aside the impugned Os-I-A, by following orders No.926-991/11-Cx dated 25.7.2011 in case of M/s Chemagis India Pvt. Ltd. of the Joint Secretary to the Government of India and relying upon Hon'ble Supreme Court judgment in the case of Superintendent (Tech-I) C.Ex. Vs. Pratap Rai reported in 1978(2) ELT J613(SC) has de-facto remanded the case to the original authority. However, the Commissioner (Appeals) has no powers to remand. Section 35A(3) of the Central Excise Act, 1944 as it existed before 11-5-2001 provided that Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling decision or order appealed against or may refer the case back to the adjudicating authority with such direction as he may think fit for a fresh adjudication or decision as the case may be, after taking additional evidence, if necessary. By an

amendment vide Finance Act, 2001 w.e.f. 11-5-2001, the phrase as mentioned in bold above has been deleted with an intention to withdraw the powers to Commissioner (Appeals) to remand the cases for fresh adjudication to the original adjudication authorities and after the said amendment in 2001, the said Section 35A(3) read as follows:-

> *"The Commissioner (Appeals) shall, after making such further enquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against."*

Thus w.e.f 11-5-2001, the Commissioner (Appeals) has no powers to remand back the case.

3.2.2 The Commissioner (Appeals) has thus failed to pass Speaking Order in the Department's appeal and failed to appreciate the fact that merely setting aside the order passed by the original authority and allowing the Department's appeal without confirming the excess amount of rebate sanctioned or by remanding the case to the original authority with suitable directions, is not proper disposal.

4. Personal hearing was scheduled in these cases on 23.12.2013 in Mumbai. Shri Rajiv Gupta attended hearing on behalf of both applicant parties and reiterated grounds of revision applications. Nobody attended hearing on behalf of department.

5. Government has carefully gone through the relevant case records and perused the impugned orders-in-original and orders-in-appeal.

6. Government observes that the said rebate claims were initially sanctioned in toto by the original authority. Department filed appeals before Commissioner (Appeals) mainly on the ground that the rebate claims were sanctioned of duty paid on value which was more than transaction value and the claims should be restricted to duty paid on transaction value. The applicant department had disputed only the excess payment of rebate claims of Rs.55661/- and Rs.1975/- only. Commissioner (Appeals) while allowing department's appeals has also set aside the entire impugned orders-in-original. Now, the applicant parties as well as department have filed these revision applications on grounds mentioned in para (3) above.

7. Government observes that as per para 3(b) (ii) of Notification No. 19/04-CE(NT) dated 6.09.04, the rebate sanctioning authority has to satisfy himself that rebate claim is in order before sanctioning the same. If the claim is in order he shall sanction the rebate either in whole or in part. The said para 3(b)(ii) 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 said provisions of this notification clearly stipulate that after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or part as the case may be depending on facts of the case. Any other plea of scope of limits of rebate sanctioning authority without review /challenge of such self-assessments it is emphasized that when cited case of M/s. Priya Blue Industries Limited (2004 (172) ELT-145 (SC))is read alongwith M/s. Jain Shudh Vanaspati Ltd. Case (1996 (86) ELT 460 (SC)), in proper perspective then it transpired that when there are inbuilt provisions in separate self-sufficient rebate sanctioning provisions than the rebate sanctioning authority should neither wait nor depend upon any other action of review process by any jurisdictional authority. The provision of Not. No. 19/04-CE(NT) dated 6.9.2004 will prevail over the CBEC Circular dated 3.2.2000. Further, the notification issued under Rule 18 of Central Excise Rules, 2002, prescribes the conditions, limitations and procedure to be following for claiming as well as sanctioning rebate claims of duty paid on exported goods. The satisfaction of rebate sanctioning authority requires that rebate claim as per the relevant statutory provisions is to be in order. He does not have the mandate to sanction claim of obviously excess paid duty. Moreover, in these cases, the applicant parties have made self-assessment of goods and it cannot be claimed that department had

assessed the goods. Therefore, the circular of 2000 as relied upon by respondents cannot supersede the provisions of Notification No. 19/04-CE (NT) dated 6.9.2004.

8. Government notes that the issue involved in this case has been decided earlier in number of cases and also in case of applicants vide GOI order No. 926-991/2011-Cx dated 25.07.2011. The operative portion of said order is reproduced as under:-

8.1 As per section 4(1) (a) of Central Excise Act, 1944 where duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of said goods such value shall.

(a) In a case where the goods are sold by the assessee, for delivery at time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.

(b) In other case, including the cases where the goods are not sold be the value determined in such manner as may be prescribed.

8.2 The word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows:

" 'Sale' and 'Purchase' with their grammatical variations and cognnate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."

8.3 Place of Removal has been defined under Section 4(3) ©(i),(ii), (iii) as:

(i) A factory or any other place or premises of production of manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) A Depot, Premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

8.4 The rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) rules, 2000 is also relevant which is reproduced below:-

"Rule 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1. – "Cost of transportation" includes –

(i) The actual cost of transportation; and

(ii) In case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods."

8.5 Government observes that from the perusal of above provisions it is clear 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", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it can not be beyond the port of loading of the export goods. Under such circumstances, the place of removal is

the port of export where sale takes place. The appellate authority's observation that it is quite possible that the parties enter into any agreement under which the exporter is obliged to deliver the goods to the Shipping Company and in such a case the place of delivery may be the place of removal is not tenable. The Commissioner (Appeals) order holding that the price contracted for sale at the time and place of removal and reflected in invoice can be accepted in a situation where the contracted price is all inclusive of freight, insurance, then such CIF price will be transaction value is contrary to provision of Section 4 of Central Excise Act and is not correct since the freight, insurance incurred beyond the place of removal/sale is to be excluded from the value as it does not form part of transaction value in terms of Rule 5 of Central Excise Valuation rules, 2000. The GOI order No.271/05 dated 25.7.05 in the case of CCE Nagpur Vs. M/s Bhagirath Textiles Ltd. reported as 2006 (202) ELT 147 (GOI) has also held as under:-

"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". It is clear from the order that in any case duty is not to be paid on the CIF value.

8.6 Hon'ble Supreme Court in its order in Civil appeal No. 7230/1999 and CA No.1163 of 2000 in the case of M/s Escort JCB Ltd. Vs CCE Delhi reported on 2002 (146) ELT 31 (SC) observed (in para 13 of the said judgement) that

> *"in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".*

Further, CBEC vide it (Section) 37B order 59/1/2003-CX dated 03-03-2003 has clarified as under:-

> *"7. 'Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [section 4(4)(b), sub-clauses (i),(ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended*

with effect from 1-7-2000, the point of determination of the assessable value under section 4 remained substantially the same. Section 4(3) (c) (i) [as on 1-7-2000] was identical to the earlier provision contained in section 4(4)(b)(i), section 4 (3)(c)(ii) was identical to the earlier provision in section 4(4)(b)(ii) and rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.

8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."

8.7 Government observes that the respondent in their counter reply relied upon the CBEC circular 203/37/96-Cx dated 26.4.96 and circular No.510/06/2000-Cx dated 3.2.2000.In this regard, the Government observes that w.e.f. 1.7.2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act. Though the CBEC circular 203/37/96-Cx dated 26.4.96 was issued when transaction value concept was not introduced yet the said circular clearly states that AR4 value of excisable goods should be determined under section 4 of Central Excise Act, 1944 which is required to be mentioned on the Central Excise invoices. Even now the ARE-1 value is to be the value of excisable goods determined under section 4 of Central Excise Act,1944 i.e. the transaction value as defined in section 4(3)(d) of Central Excise Act. CBEC has further reiterated in its subsequent circular No.510/06/2000-Cx dated 3.2.2000 that as clarified in circular dated 26.4.96 the AR4 value is to be determined under section 4 of Central Excise Act, 1944 and this value is relevant for the purpose of rule 12 and 13 of Central Excise Rules. The AR4 and rule 12/13 are now replaced by ARE-1 and rule 18/19 of Central Excise Rules, 2002. It has been stipulated in the notification No.19/04-CE(NT) dated 6.9.04 and the CBEC circular No.510/06/2000-Cx dated 3.2.2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provision of Central Excise Act.

Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

8.1 Government has held that rebate of duty paid on transaction value of goods determined under section 4 of Central Excise Act 1944 is admissible under rule 18 of Central Excise Rules 2002 read with Not. No. 19/04-CE(NT) dated 6.9.2004. Government had reiterated the findings of GOI order No.271/05 dated 25.7.2005 in the case of M/s Bhagirath Textiles 2006 (202) ELT 147 (GOI) wherein it was held that exporter is not liable to pay duty on CIF value of goods but duty is to be paid on transaction value determined under Section 4. Government notes that said issue in the case of applicants in GOI order No. 926-991/2011-Cx dated 25.07.2011 was decided and ratio of said order is squarely applicable to these cases.

8.2 Applicants have now relied heavily on CBEC Circular No. 510/06/2000-Cx dated 3.2.2000 and above GOI order No. 1685/10-Cx dated 3.11.2010 and 1805/10-Cx dated 24.12.2012 in the cases of M/s SPL Industries Faridabad and M/s Sterlite Industries (India) Ltd. Tuticorin respectively.

8.3 In the case of Sterlite Industries (I) Ltd. issue related to rebate of duty paid on supplementary invoices raised by foreign buyer on finalization of provisional values and duty amount paid was not reflected in the ARE-I as the invoices were raised subsequent to exports. In that case, rebate of said duty paid on

supplementary invoices was allowed by Government since transaction value was revised subsequently and the said claim was filed within one year from the date of export. In the said case, no issue of CIF value / FOB value was examined.

8.4 Similarly in the case of SPL Industries, Government in para 8 of its order had noted that the foreign remittances as per BRCs is equal to the ARE-1 value and therefore the order-in-appeal accepting the ARE-1 value as transaction value was upheld without examining the transaction value with respect to CIF/FOB value. In the said case, Government had not specifically examined the issue of transaction value with respect to CIF value/FOB value. Government has subsequently examined the issue of transaction value with respect to CIF value / FOB value in number of Revision Orders in the case of namely M/s Pidilite Industries Ltd., GOI order NO. 1536-1564/11-Cx dated 18.11.2011, M/s Rohm & Hass (I) Pvt. Ltd., GOI order No. 728-732/11-RA-Cx, M/s Vinati Organics Ltd. GOI order No.573-604/11-Cx dated 26.5.11, and number of other orders. In all these orders a similar decision is taken. The similar decision taken in applicants case vide GOI Order No. 926-991/2011-Cx dated 25.07.2011 has also been reproduced in para 8 above. Applicant is citing order of the year 2010 which cannot be made applicable to the present issue due to the reason stated above. Moreover, the issue is specifically dealt in the revision orders issued in the year 2011 and 2012 as mentioned above and the ratio of said orders is squarely applicable to this case. So it is wrong to contend that applicant is being given different treatment.

8.5 For applicability of the cited precedents, Government is of the opinion which is guided by the observations of Hon'ble Supreme Court in para 10 of the judgement in case of Escorts Ltd. vs. CCE Delhi-II 2004 (173) ELT 113 (SC) which inter alia stipulates precedent –circumstantial flexibility - One additional or different fact may make a world of difference between conclusion of two cases – Disposal of two cases by blindly placing reliance on a decision, not proper - In para 11 of said judgment following observations are made:-

"11. The following words of Lord Denning in the matter of applying precedents have become locus classicus:-

" ...."Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases. One should avoid temptation to decide cases by matching the colour of one case against the colour of another .....".

Therefore, there cannot be any strict statutory relied upon citation which can be taken as guiding precedents because each one of above citation have different background of factual merits pertaining to manufacturers manufacturing goods of different sub-headings following different set of Notifications, choosing different beneficial schemes and changing thereof in between a given financial year thereby leading to arise of different question of law.

8.6 Applicant has argued that freight and insurance incurred beyond the port of export cannot be excluded from transaction value on it not mentioned separately in the invoice. Here, applicant has argued contrary to GOI order mentioned in para 8.4 above and to the provisions of rule 5 of valuation rules 2000. Explanation 2 of said rule state that cost of transportation from factory to place of removal where factory is not the place of removal shall not be excluded for the purpose of determining value of excisable goods. As per discussion in para 8, the place of removal cannot be beyond the port of export. So the transportation cost, at the most upto port of export (the place of removal) can be included in the value.

9. It has been contended by the applicants that the difference in AREs-1 value and FOB value given in the Shipping Bill is due to the difference in calculations only and the same cannot be attributed to freight & insurance charges. Applicant has claimed that difference in ARE-1/FOB Value is due to difference in foreign exchange rates adopted in the case of ARE-1 & Shipping Bills. In this regard Government observes that CBEC has clarified in CircularNo.510/06/2000-Cx dated 3.02.2000 that there is no question of requantifying the amount of rebate by applying some other rate of exchange prevalent to subsequent the date on which the duty was paid. From this, it is quite clear that the rebate amount need not be changed if the

difference in both values is due to difference in exchange rate subject to condition that value represents transaction value. This contention merits consideration and is required to be considered by the original authority after doing necessary verifications from records. The rebate claims initially sanctioned by original authority excluding the disputed amounts of Rs.55661/- and Rs.1975/- as stated above are in order as the same was not challenged at all. Commissioner (Appeals) has erred in setting aside the sanction of entire rebate claims. As such, the sanction of impugned rebate claim excluding the disputed amount of Rs.55661/- and Rs.1975/- is upheld and impugned orders-in-original are restored to this extent. The impugned order-in-appeal is also modified to this extent. The matter is required to be remanded back to original authority to decide afresh the rebate claims to the extent of disputed amounts of Rs.55661/- and Rs.1975/- only.

10. In view of above discussion, Government remand the matter back to original authority to decide the same afresh in the light of above observations. A reasonable opportunity of hearing is to be afforded to concerned parties.

11. Revision applications are disposed off in above terms.

12. So, ordered.

(D.P. Singh)
Joint Secretary (Revision Application)

(1) M/s Chemagis India Pvt. Ltd., Shivam Chambers, 106/108, 1st Floor, S.V.Road, Goregaon (W), Mumbai-400062
(2) M/s Dy-Mach Pharma, Mumbai, B-12, Anand Sagar, Old Nagardas Road, Andheri (East) Mumbai-69
(3) Commissioner of Central Excise & Customs, Raigad Commissionerate, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector 17, Plot No.1, Khandeshwar, Navi Mumbai – 410 206

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

F.No. 195/129-130/12-RA
F.No. 198/30-31/12-RA

Order No. 12-15 /2014-Cx dated 28.01.2014

Copy to:

1. Commissioner of Central Excise & Customs, Raigad Commissionerate, 4th Floor, Kendriya Utpad Shulk Bhawan, Sector 17, Plot No.1, Khandeshwar, Navi Mumbai – 410 206

2. M/s Chemagis India Pvt. Ltd., Shivam Chambers, 106/108, 1st Floor, S.V.Road, Goregaon (W), Mumbai-400062

3. M/s Dy-Mach Pharma, Mumbai, B-12, Anand Sagar, Old Nagardas Road, Andheri (East) Mumbai-69

4. Commissioner of Central Excise (Appeals-II), Mumbai Zone, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra Kurla Complex, Bandra(East), Mumbai-400 051.

5. The Deputy Commissioner of Central Excise (Rebate), Raigad, Office of the Maritime Commissioner, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot No. 1, Khandeshwar, Navi Mumbai – 410 206

6. PA to JS (RA)

7. Guard File

8. Spare copy

ATTESTED

(B.P.Sharma)
OSD (Revision Application)