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F.No. 195/1295-1297/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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Date of Issue....13.9.13

ORDER NO. 1238 – 1240 /13-Cx DATED 10.09.2013 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 No.US/281-283/RGD/2011 dated 23.9.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II, Mumbai
Applicant	:	M/s Hindalco Industries Ltd., Mumbai
Respondent	:	Commissioner of Central Excise, Mumbai-II

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ORDER

These revision applications are filed by the M/s Hindalco Industries Ltd., Mumbai against the orders-in-appeal No.US/281-283/RGD/2011 dated 23.9.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II, Mumbai with respect to orders-in-original No.81/10-11 dated 19.4.11, 249/10-11 dated 18.5.11 and 253/10-11 dated 18.5.11 passed by the Deputy Commissioner of Central Excise (Rebate) Raigad.

2. Brief facts of the case are that the applicants exported the goods on payment of duty under rebate claim under Rule 18 of Central Excise Act, 1944 read with Notification No.19/04-CE(NT) dated 6.9.04. They filed rebate claim with the Assistant Commissioner of Central Excise (Rebate), Raigad who found that FOB value was less than ARE-1 value of exported goods. On scrutiny of documents the Assistant Commissioner of Central Excise found the FOB value was conforming the assessable value in terms of Section 4 of Central Excise Act, 1944 and therefore he sanctioned the rebate of duty payable at the said assessable value and rejected the balance amount of rebate claim, i.e. Rs.31438/-, Rs.51257/- and Rs.70836/-.

3. Being aggrieved by the impugned orders-in-original applicant filed appeal before Commissioner (Appeals), who rejected the same.

4. Being aggrieved by the impugned orders-in-appeal, the applicant has filed these revision applications under Section 35EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 It is an internationally accepted principle that goods to be exported out of a country are relieved of the duties borne by them at various stages of their manufacture in order to make them competitive in the international market. The most widely accepted method of relieving such goods of the said burden is the

scheme of rebate. Thus in order to make Indian goods competitive in the International market, the tax element in the exporter's cost is refunded to him through the system of rebate. CBEC Circular No.687/03/2003-CX dated 2.1.2003 clarifying that duty paid through CENVAT credit must be refunded in cash in the case of export. Vide CBEC Circular No.510/06/2000-CX dated 3.2.2000, it is clarified that there is no question of re-quantifying the amount of rebate by the rebate sanctioning authority once the duty payment is certified by the jurisdictional Range Supdt. It is also clarified that the rebate sanctioning authority should not examine the correctness of the assessment but should examine only the admissibility of rebate of duty paid on the export goods covered by a claim. In view of the same the part amount between assessable value and FOB value of duty paid Rebate claim rejected by the Deputy Commissioner (Rebate), Raigad needs to be set aside and the difference amount may be directed to sanction and refunded to the Applicants. CEBC Circular No.203/37/96-CX dated 26.4.1996 clarifies that Section-4 value is relevant for the purpose of Rule 12 & 13 (Present Rule 18 and 19 of Central Excise Rules,2002) of Central Excise Rules, 1944 . "FOB Value" is relevant for Customs purpose and other schemes like drawback, exports under DEEC etc. hence whatever the value and duty shown on the ARE-1 and certified by the Jurisdictional Central Excise Officer is the Section-4 Value which needs to be refunded. The difference between FOB value and ARE-1 value as claimed by the Department is not only in respect of freight and insurance but is also mainly because of change in currency value. The Applicants take the currency value as on Ist day of the month whereas they receive the money later and at that time of receipt of money there is different currency value will be there.

They have also relied upon order-in-appeal No.180/R/RGD/2010 passed by Commissioner of Central Excise (Appeals) whereunder rebate of duty paid on ARE-1 was allowed ignoring the lower FOB Value.

5. Personal hearing scheduled in this case on 8.8.2013 at Mumbai was attended by Shri Narendra S.Dave, Chartered Accountant on behalf of the applicant, who reiterated the grounds of revision application.

6. Government has carefully gone through the relevant case records available in case files, oral and written submissions and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records, Government observes that in these cases the original authority, after scrutiny of rebate claim papers, has accepted the FOB value of goods as assessable value under Section 4 of Central Excise Act 1944 and therefore sanctioned the rebate claim of duty payable on the said assessable value of exported goods. Commissioner (Appeals), has upheld the said order rejecting the rebate claims of duty paid on value portion which was in excess of assessable value. Applicant has now filed these revision applications on grounds that they are entitled for the rebate of total duty paid on exported goods that provisionally value was finalized by jurisdictional Assistant Commissioner of Central Excise and rebate of duty paid on said value was claimed, that rebate sanctioning authority cannot reassess the value as laid down in CBEC Circular that the difference in FOB value and ARE-1 value is not only due to freight and insurance but also due to fluctuation in foreign exchange rate.

8. Government notes that dispute is limited to minor difference in FOB and ARE-1 value. It is also on record that applicant had sold the goods on CIF value. So it means the ARE-1 value is CIF value. It is well known that CIF value includes freight & insurance charge beyond the port of export which cannot form part of assessable value determined under Section 4 of Central Excise Act 1944.

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.
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> 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.
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> 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 after clearance from factory. 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 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.

9. Government notes that lower authority after examining the case records has accepted the FOB value of said goods as assessable value under Section 4 of Central Excise Act 1944. Applicant has not submitted any evidence in support of his claim that difference in FOB value & ARE-1 value is also due to fluctuation in foreign exchange rates. As such said pleading cannot be accepted.

10. Government notes that said 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 and then initiate proceeding for recovery of the erroneously paid rebate claim. Therefore, the circular of 2000 as relied upon by applicant cannot supersede the provisions of Notification No. 19/04-CE(NT). Adjudicating authority has therefore rightly sanctioned the part rebate claim, and also rightly held that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated a voluntary deposit with the Government which is required to be returned to the assesses / respondents 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 reported as 2009 (235) ELT-22 (P&H) 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."*

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

11. In view of above position, Government holds that rebate claim is rightly sanctioned by the lower authority. However, it is directed that the excess paid amount may be allowed as recredit in the Cenvat Credit Account from where it was initially paid. The impugned orders-in-appeal are modified to this extent.

12. The revision applications are disposed of in terms of above.

13. So ordered.

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

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Ministry of Finance, (Deptt. of Re...
...(Govt. of India

Order No. 1238-1240 /2013-Cx dated 16.09.2013

Copy to:

1. Commissioner of Central Excise Central Excise, Mumbai Zone-II.
2. Commissioner of Central Excise (Appeals), Central Excise, Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra Kurla Complex, Bandra(East), Mumbai-400 051.
3. The Deputy Commissioner of Central Excise Raigad, Ground Floor, Kendriya Utpad Shulk Bhavan, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai-410 206.
4. PA to JS (RA)
5. Guard File
6. Spare copy

ATTESTED

(T.R.Arya)
Superintendent (Revision Application)