REGISTERED SPEED POST AD

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 195/372/14-RA/992 Date of Issue: 29.01.2019

ORDER NO.123/2020-CX (WZ) /ASRA/MUMBAI DATED 20.01.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s. Garware Polyester Ltd.
L-6, MIDC, Chikalthana Industrial Area,
Garware Marg,
Aurangabad, Maharashtra 431 210

Respondent : Commissioner, Central Excise & Customs, Aurangabad

Subject : Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the OIA No. AV(182)210/2014 dated 27.08.2014 passed by the Commissioner of Central Excise & Customs(Appeals), Aurangabad.

ORDER

The revision application has been filed by M/s. Garware Polyester Ltd., L-6, MIDC, Chikalthana Industrial Area, Garware Marg, Aurangabad, Maharashtra 431 210 (hereinafter referred to as "the applicant") against OIA No. AV(182)210/2014 dated 27.08.2014 passed by the Commissioner of Central Excise & Customs(Appeals), Aurangabad.

2.1 The applicant was engaged in the manufacture of polyester films falling under chapter 39 of the CETA, 1985. The applicant was exporting the excisable goods on payment of duty and they were claiming rebate under Rule 18 of the CER, 2002. During the period from 01.04.2013 to 31.12.2013, the applicant had exported the excisable goods on payment of duty and claimed rebate of such duty paid. The said rebate claims were sanctioned vide different OIO's.

2.2 During the scrutiny of the rebate claims alongwith respective ARE-1, shipping bills, factory invoices, it was observed that there was a difference in FOB value shown in the shipping bills and the transaction value shown in ARE-1 and export invoice. The difference in FOB value and transaction value was due to freight and insurance charges added in the transaction value. The applicant had paid central excise duty on the transaction value shown in the ARE-1 and export invoice and claimed rebate of the said duty. While determining the value for the purpose of export, the applicant had included freight and insurance charges. The value for the purpose of export clearances ought to be the FOB value but the applicant had paid central excise duty on the value which was inclusive of freight and insurance. The erroneously sanctioned rebate claims on the value pertaining to freight and insurance was recoverable alongwith interest under the provisions of Section 11A of the CEA, 1944 read with Section 11AA of the CEA, 1944.

2.3 An SCN was issued to the applicant by the Department for recovery of erroneously sanctioned rebate claim of Rs. 3,72,265/- alongwith interest. The SCN was adjudicated vide OIO No. 09/CEX/AC/Dn-I/14-15 dated 02.07.2014 by the Assistant Commissioner, Aurangabad-I Division confirming the demand of Rs. 3,72,265/- alongwith interest.

3.1 Aggrieved by the OIO dated 02.07.2014, the applicant preferred appeal before the Commissioner(Appeals). The Commissioner(Appeals) made reference to the provisions

of Section 4(1)(a) of the CEA, 1944, the definition of sale in Section 2(g) of the CEA, 1944, the definition of place of removal in the Section 4(3)(c)(i), (ii), (iii) of the CEA, 1944 and Rule 5 of the Central Excise Valuation(Determination of Price of Excisable Goods) Rules, 2000. He found that the place of removal may be a factory/warehouse, depot, premises of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at the place of removal. He averred that the meaning of the words "any other place" read with the definition of "sale" cannot be construed to have the meaning of any other place outside the geographical limits of India. He drew attention to the fact that as per Section 1 of the CEA, 1944, the Act is applicable within the territorial jurisdiction of India and the concept of transaction value deals with value of excisable goods produced/manufactured within the territory of India. He therefore inferred that once the place of removal is established to be within the geographical limit of India, it cannot be considered to be any place beyond the port of loading of the export goods. Therefore, freight and 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 the Valuation Rules.

3.2 Commissioner(Appeals) observed that the applicant had relied upon the Board Circular No. 203/37/96-CX dated 26.04.96 to contend that AR-4 value is to be determined under Section 4. He pointed out that Circular No. 510/6/2000-CX dated 03.02.2000 also clarifies that AR-4 value is to be determined under Section 4. He also took note of the fact that the AR-4 has now been replaced by the ARE-1 where the value would again have to have determined under Section 4. With regard to the contention that the rebate of the whole of the duty of excise is to be granted is concerned, the appellate authority observed that "whole of the duty of excise" would mean the duty payable under the CEA and has to be limited to the cost elements incurred upto the place of removal; i.e. the port of export. In so far as the reliance upon the case laws of Sterlite Industries Ltd.[2009(236)ELT 143(Trb)] and Rukmani Pakwell Traders[2004(170)ELT 568(Trb)] is concerned, the Commissioner(Appeals) observed that the adjudicating authority had correctly relied upon the case of Unique Pharmaceutical Lab[2013(195)ELT 129(GOI)]. He observed that the Board Circular No. 510/6/2000-CX dated 03.02.2000 and the case law of Sterlite Industries (India) Ltd. Order-in-Revision No. 1805/2010-CX dated 24.12.2010 were duly considered in the case of Unique Pharmaceutical Lab.[2013(295)ELT 129(GOI)]. Moreover, the decision in the case of

Unique Pharmaceutical Lab is the later decision and therefore in terms of judicial discipline, the later decision would prevail. Commissioner(Appeals) found that the case of Sterlite Industries Ltd. was distinguishable as that case related to supplementary invoices raised by the foreign buyer on finalization of provisional values and duty paid thereon which was not reflected in the ARE-1 whereas the issue in the present case is that the applicant was liable to pay duty on the transaction value but has actually paid duty on the CIF value.

3.3 Commissioner(Appeals) further averred that the money paid on their own volition in excess of duty liability was a voluntary deposit with the Government which was to be returned to the applicant in the manner in which it was paid. He placed reliance upon the judgment of the Hon'ble Punjab & Haryana High Court in the case of Nahar Industrial Enterprises Ltd. vs. UOI[2009(235)ELT 22(P&H)]. He held that the applicant was entitled to rebate of duty paid on the FOB value of the goods and that the excess duty paid by them was to be credited into their CENVAT account. He further observed that the applicant had received excess rebate in cash and hence there was financial accommodation and unjust enrichment. Therefore, they were liable to pay interest on the excess rebate sanctioned and received in cash. In such manner, the appeal filed by the applicant was rejected by the Commissioner(Appeals) vide OIA No. AV(182)210/2014 dated 27.08.2014.

4. Aggrieved by the OIA No. AV(182)210/2014 dated 27.08.2014, the applicant has filed revision application on the following grounds:

(i) The applicant submitted that the price agreed is a composite price including sea freight and sea insurance upto the port of import. The foreign customer is the owner of the goods at the port of export in India as the concerned Bill of Lading is in issued in their name. Hence, the sale is for delivery at the port in India but the price would include sea freight and sea insurance upto the port of import in terms of the contract.

(ii) Under Section 4(3)(d) of the CEA, 1944, the "transaction value" includes any amount that the buyer is liable to pay the seller by reason of, or in connection with the sale. The applicants submitted that inspite of the fact that the insurance and freight have been incurred beyond the port of export, it would still form part

of the transaction value in terms of Section 4 of the CEA, 1944. They therefore averred that the finding of the Commissioner(Appeals) that expenses incurred beyond place of removal would not form part of the transaction value was incorrect and baseless.

(iii) They placed reliance upon para 4.1 of Chapter 8 of the CBEC Manual which states that the value on which excise duty has been paid may be more, equal, less than FOB value. The applicant claimed to have paid excise duty on "transaction value" under Section 4; i.e. FOB value + sea freight + sea insurance. Hence, there was no question of denying any portion of the rebate claim.

(iv) The applicant submitted that Rule 18 of the CER, 2002 grants rebate of excise duty paid on finished goods which had been exported. Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule-18 grants rebate of the whole of the duty paid on export goods. Therefore, it was clear that the whole of the duty of excise paid was available as rebate.

(v) The applicant referred CBEC Circular No. 510/06/2000-CX dated 03.02.2000 which clarified that AR-4 value is to be determined under Section 4 of the CEA, 1944 and this value is relevant for the purpose of Rule 12 and Rule 13. It was also clarified that there was no question for re-quantifying the amount of rebate by applying some other rate of exchange prevalent subsequent to the date on which duty was paid. It was further clarified that the rebate sanctioning authority should not examine the correctness of assessment but should only examine the admissibility of duty paid on export goods covered by a claim; that the duty element shown on AR-4 has to be rebated if the jurisdictional Range Officer certifies it to be correct.

(vi) They also drew attention to Instruction No. 15/2000 dated 07.12.2000 issued by the Commissioner of Central Excise, Aurangabad which clarified that it was the responsibility of the Range Superintendent to ensure that the assessee pays central excise duty as per Section 4 read with the Valuation Rules; that the rebate sanctioning authority should not examine the correctness of the assessment and that only admissibility of rebate of duty paid on export goods should be examined.

(vii) The applicant placed reliance on the decision of the CESTAT in the case of Sterlite Industries Ltd. vs. CCE[2009(236)ELT 143(Trb)] which they averred involved an identical dispute. It was pointed out that in the said case, the tribunal allowed rebate of duty paid on CIF value.

(viii) The applicant relied upon the judgment of the Hon'ble Supreme Court in the case of Rukmani Pakkwell Traders[2004(165)ELT 481(SC)] to contend that exemption notifications have to be strictly construed.

(ix) They also placed reliance upon the decision of the Tribunal in the case of Bharat Chemicals vs. CCE[2004(170)ELT 568(Trb)] wherein it was held that actual amount of duty paid is to be rebated and not duty payable.

(x) The applicant further submitted that they had availed CENVAT credit on inputs, input services and capital goods which was used for payment on clearance of goods. They averred that the fact of duty payment through CENVAT account could not be a ground for denying refund in cash. In this regard, they placed reliance on CBEC Circular No. 21/89-CX.6 dated 04.04.1989. They also referred CBEC Circular No. 687/3/2003-CX dated 03.01.2008 to contend that there was no discretion with the rebate sanctioning authority to refund duty paid on exported goods through credit account. The applicant submitted that these circulars issued by the Board were binding upon the Department.

(xi) The applicant contended that the decision in the case of Unique Pharmaceuticals[2013(295)ELT 129(GOI)] was based on presumption.

(xii) The applicant submitted that it was a settled principle of law that where the demand is not sustainable, interest cannot be recovered.

5. The applicant was granted a personal hearing on 30.08.2019. Ms. Payal Nahar, CA appeared on behalf of the applicant and handed over written submissions and case compilations. It was averred that without prejudice to the their submissions made in the revision application, even if the amount representing duty paid on the difference between CIF value and FOB value of the export goods is liable to be re-credited to the CENVAT account, the applicants were entitled to refund of the same in cash in terms of Section 142(3) of the CGST Act, 2017. In support of these submissions, the applicant

placed reliance upon the judgment of the Hon'ble Bombay High Court in the case of Hindalco Industries Ltd. vs. UOI[2018-TIOL--18-HC-MUM-GST], the decisions in the cases of Oswal Castings Pvt. Ltd. vs. CCE[2019(24)GSTL 649(T)], SMG International vs. CCE[2019(21)GSTL 446(T)] and Toshiba Machine (Chennai) Pvt. Ltd. vs. CCT - MANU/CC/0227/2018. The applicant contended that in view of these judgments/decisions, since the rebate claim was filed under the existing law, the amount of rebate by way of CENVAT credit accruing to the applicant should be granted in cash in terms of the provisions of Section 142(3) of the CGST Act, 2017. They claimed that there was no revenue implication for the principal amount as well as interest. The applicant further submitted that in view of the High Court Order dated 05.03.2018, no action should be taken against the applicants for recovery even if they failed before the Revisionary Authority. It was averred that the issue involved was purely academic in nature and the revision application may be disposed of accordingly.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal. On perusal of records, Government observes that the applicant filed rebate claims in respect of duty paid on exported goods. It was subsequently observed during scrutiny of the sanctioned rebate claims that there was difference in the FOB value shown in the shipping bills and the transaction value shown in ARE-1 and export invoice. It was found that the difference in FOB value and transaction value was due to freight and insurance charges added to the transaction value. An SCN was therefore issued to the applicant by the Department for recovery of erroneously sanctioned rebate amounting to Rs. 3,72,265/- alongwith interest. The said demand for recovery of erroneously sanctioned rebate was confirmed by the adjudicating authority and has been upheld by the Commissioner(Appeals) in the impugned order.

7. Government observes that the short issue in this case is whether the freight and insurance charges incurred beyond the port of export upto the port of the importer is part of the transaction value of the exported goods. Government observes that this issue resonates with the issues which have received the attention of the Hon'ble Supreme Court in the case of CC & CE, Aurangabad vs. Roofit Industries Ltd.[2015(319)ELT 221(SC)] in respect of domestic clearances. In that case, the Apex Court has very categorically held that expenses incurred after removal of goods from factory gate; viz.

freight, insurance and unloading charges etc. are not to be included in valuation of excisable goods. Needless to say, the same principle would be applicable to goods cleared for export.

8.1 In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in F. No. 195/126/2012-RA in the case of Sumitomo Chemicals India Pvt. Ltd. reported at 2014 (308) E.L.T. 198 (G.O.I.). While deciding the issue Government, in its aforesaid Order discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section 2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under :-

> ***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 cannot 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 GOI Order No. 271/2005, dated 25-7-2005 in the case of CCE, Nagpur v. M/s. Bhagirth Textiles Ltd. reported in 2006 (202) E.L.T. 147 (GOI) has also held as under :-*
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> *"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 *Supreme Court in its order in Civil Appeal No. 7230/1999 and CA No. 1163 of 2000 in the case of M/s. Escorts JCB Ltd. v. CCE, Delhi reported in 2002 (146) E.L.T. 31 (S.C.) observed (in para 13 of the said judgment) 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 3-3-2003 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.*
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> *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."*

8.2 The Government also observed in its aforesaid Revision Order that

"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 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 provisions 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. v. UOI reported in 2009 (235) E.L.T. 22 (P&H).

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.

9. The facts of the present Revision Application being similar to the facts in the decision cited above, the ratio of the same is squarely applicable to this case. The place of removal has been extended upto the port of export in the case of export goods. Be that as it may, CIF value cannot be transaction value and therefore as a corollary freight and insurance beyond the port of export cannot be the part of transaction value. Moreover, any expenditure incurred beyond the international borders cannot be a part of valuation under Central Excise Act, 1944 in view of the provisions of Section 1 of Central Excise Act, 1944 which stipulates that the jurisdiction of the said Act extends only within the territory of the whole of India and not beyond. In view of the foregoing, Government notes that in this case the duty was paid on CIF value and therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value has rightly been held to be recoverable from the applicant. Government is of the view that the excess paid amount which is held to be inadmissible for being rebated under Rule 18 of CER, 2002, it is to be allowed as re-credit in the CENVAT credit account from where said duty was initially paid subject to compliance of provisions of Section 12B of

Central Excise Act, 1944. The recourse of allowing re-credit of excess amount paid as duty on the CIF value in the CENVAT credit account has been approved by the Hon'ble Gujarat High Court in the case of Garden Silk Mills Ltd. vs. UOI[2018(11)GSTL 272(Guj)]. Hence, the case laws cited by the applicant to contend that the excess amount paid as duty by them on the CIF value of the goods is to be paid in cash are of no avail. In so far as the judgment of the Hon'ble Supreme Court in the case of CCE, Trichy vs. Rukmani Pakkwell Traders[2004(165)ELT 481 (SC)] is concerned, it has been rendered while interpreting SSI exemption notification whereas the facts of the present case involve a non-tariff notification; viz. Notification No. 19/2004-CE(NT) dated 06.09.2004 which sets out the procedure for claiming of rebate of duty on export of goods to countries other than Nepal and Bhutan.

10. In this regard, the Government observes that the applicant has made out some arguments about the fact that with the implementation of GST, allowing re-credit of the excess duty paid was no longer an option. They have also drawn attention to the judgment of the Hon'ble Bombay High Court in the case of Hindalco Industries Ltd. vs. UOI[2018-TIOL-18-HC-MUM-GST] holding that any amount allowable as re-credit of CENVAT credit has to be granted as cash refund in terms of Section 142(3) of the CGST Act, 2017. With due respect of the judgment of the Hon'ble High Court, the powers being exercised by the Government in the present proceedings are powers vested in terms of Section 35EE of the CEA, 1944 and cannot exceed the scope of the Central Excise Act, 1944. The provisions of the CGST Act, 2017 are not exercisable in revision. Therefore, the relief in this regard can only be obtained from the authorities empowered under the CGST Act.

11. Government therefore upholds the impugned order and rejects the revision application filed as being devoid of merits.

12. So ordered.

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

ORDER No.123/2019-CX (WZ) /ASRA/Mumbai DATED 20.01.2020

To,

M/s. Garware Polyester Ltd.
L-6, MIDC, Chikalthana Industrial Area,
Garware Marg,
Aurangabad, Maharashtra 431 210

Copy to: -

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