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F.No. 195/1223/11-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...23.11.13

ORDER NO. 1274/2013-CX DATED 19.09.2013 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 Order-in-Appeal No.US/249/RGD/2011 dated 20.9.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-II

Applicant : M/s Om International, Mumbai.

Respondent : The Commissioner of Central Excise, Mumbai-II

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ORDER

This Revision application is filed by the applicants, M/s Om International, Mumbai against the order-in-appeal No.US/249/RGD/2011 dated 20.9.2011 passed by the Commissioner of Central Excise (Appeals), Mumbai-II with respect of order-in-original passed by the Deputy Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that the applicants, filed various rebate claims. The rebate claims were restricted to the duty paid on FOB value of exported goods by the original authority vide impugned order-in-original on the ground that FOB value is correct transaction value in this case in terms of Section 4 of Central Excise Act 1944.

3. Being aggrieved by the said order-in-original, applicant filed appeal before Commissioner (Appeal), who rejected the same.

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

4.1 It is submitted that the respondent has merely concluded that part of the rebate claim is rejected but has not assigned any reason for rejecting the same. It is submitted that the Hon'ble Supreme Court in the case of Tata Engineering & Locomotive Co. Ltd. Vs. Commissioner of Central Excise, Pune reported in 2006(203) ELT 360(SC) has held that it is necessary to give reason in support of their conclusion.

4.2 In any event it is submitted that the Commissioner (Appeals) in the case of Ambuja Intermediates Pvt. Ltd. by an order-in-appeal No.YDB/724 & 725/RGD/2010 dated 29 October 2010, under similar circumstances, has rejected the appeals filed by the department and allowed the rebate claim filed by the assesse.

4.3 It is submitted that the respondent has no justification in not granting the rebate especially when the applicants have fulfilled all the conditions and procedures as mentioned in the notification dated 06.09.2004. It is submitted that the duty has been paid by the applicants on the assessable value as mentioned in the invoices and that it is not in dispute that the foreign exchange has been received on the said assessable value. It is submitted that when the above facts are not in dispute then it is not open for the department to allow rebate only to the extent of the FOB value and reject the rebate claimed on the assessable value.

4.4 The department should have followed in the procedure laid down in CBEC Circular No.510/06/2000-Cx dated 3 February 2000 and referred the matter to the jurisdictional Assistant/Deputy Commissioner.

5. Personal hearing scheduled in this case on 7.8.2013 was attended by Shri R.V.Shetty, Advocate on behalf of the applicant, who reiterated the grounds of revision application. Nobody attended hearing on behalf of department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the instant rebate claims were restricted by original authorities to duty payable on FOB value of exported goods. Commissioner (Appeals) upheld the impugned order-in-original. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government observes that for proper understanding of the issue of valuation, the relevant statutory provisions for determination of value of excisable goods may be perused which are as under:

8.1 As per basic applicable 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 assesse, for delivery at time and place of the removal, the assesse 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 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 cognate 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 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 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 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 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. 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.

9. Government observes that the CBEC Circular No.510/06/2000-Cx dated 3.2.2000 has also been relied upon by applicant. 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 and therefore said Circular issued prior to introduction of transaction value concept, cannot be strictly applied after 1.07.2000. 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.

9.1 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.

9.2 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 rightly sanctioned the rebate claim as admissible to applicant.

10. Government notes that in the case applicant has paid duty on CIF value which was declared as value in Central Excise Invoice for payment of duty. In view of position explained above, the freight & insurance expenses beyond place of removal cannot form part of transaction value. In this case the lower authorities has determined the FOB value as transaction value since goods stand sold at the port of export where

possession of goods is transferred. As such, the rebate of duty paid on FOB value is rightly sanctioned. However, the excess paid amount be allowed as recredit in the Cenvat Credit Account from it was paid/debited. The impugned order-in-appeal is modified to this extent.

11. Revision application is disposed off in above terms.

12. So, ordered.

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

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(भागवत शर्मा/Bhagwat Sharma)
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CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Revn)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

G.O.I. Order No. 1274 /13-Cx dated 19.09.2013

Copy to:-

1. The Commissioner of Central Excise Raigad Commissionerate, Plot No.1, Kendriya Utpad Shulk Bhavan, Sector-17, Khandeshwar, Navi Mumbai 410206.

2. The Commissioner of Central Excise (Appeals), Mumbai-II, 3rd Floor, Utpad Shulk Bhavan, Plot No.C-24, Sector-E, Bandra-Kurla Complex, Bandra (East), Mumbai 400051.

3. The Deputy Commissioner, Central Excise(Rebate), Raigad, Ground Floor, Kendriya Utpad Shulk Bhavan, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai 410206.

4 PS to JS (Revision Application)

5 Guard File

6. Spare Copy.

(Attested)

23/9

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