F.No. 373/324/DBK/2014-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
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Mumbai- 400 005

F.No. 373/324/DBK/2014-RA/1456 Date of Issue: 18.09.2020

ORDER NO. 131 /2020-CX (WZ)/ASRA/MUMBAI DATED 10.08.2020 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 Synthite Industries Ltd.

Respondent : Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. 79/2014-Cus dated 18.06.2014 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin.

ORDER

This Revision Application is filed by the M/s Synthite Industries Ltd., Synthite Valley, Kolenchery, Ernakulam, Kerala – 682 331(hereinafter referred to as "the Applicant") against the Order-in-Appeal No. 79/2014-Cus dated 18.06.2014 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin.

2. The issue in brief is that the Applicant had filed an application for fixation of Brand rate Drawback claim for Rs. 2,42,202/-(Rupees Two Lakhs Forty Two Thousand Two Hundred and Two Only) being the duty paid on 700 Kg of Black Pepper Oil exported. The claim had been registered under Sl.No.2/2011 dated 05.01.2011. The Applicant had originally imported 720 Kg of Black pepper oil vide Bill of Entry No. 2320188 dated 10.11.2010 and after the process of mixing with indigenously procured pepper oil for quality upgradation, fileration, etc., exported 700 Kg of the same to Germany vide Shipping Bill Nos.1948034 dated 10.12.2010. 1963629 dated 10.12.2010 and 223 dated 03.12.2010 and submitted application for Brand rate fixation and Drawback claim. The Asst. Commissioner of Customs (Technical) Hqrs, Cochin Commissionerte vide C.No.VIII/48/3/2011 Cus Tech dated 18.5.2011 fixed the Brand rate of Black pepper oil @ Rs.346/- per Kg and sanctioned Drawback of Rs. 2,42,201/-. The Internal Audit of Central Excise, Cochin Commissionerte conducted post audit of the claim and raised an objection that that as per Rule 3 of Drawback Rules, 1995, the average duties paid on imported materials or excisable materials used in the manufacture of export goods are entitled for Drawback. Later Government issued orders for considering CVD, SAD & Addl. Duty paid in debit scrips also for fixation of Drawback rate and no where issued orders for considering the BCD paid in debit scrips for Brand rate fixation of Drawback. The present claim pertain to BCD paid in credit scrips and hence the Drawback of Rs.2,42,201/- paid vide Order C.No.VIII/48/3/2011 Cus Tech dated 18.5.2011 was erroneous and liable to be recovered under Rule 16 of Drawback Rules,1995 read with Section 142 of Customs Act,1962

along with interest @18% on the Drawback erroneously received under Section 75A (2) of the Act. Hence, the Applicant was issued Show Cause Notice dated 22.11.2012. The Assistant Commissioner(CUS Tech), Cochin vide Order-in-Original No. 1/2013 CUS TECH dated 02.01.2013 dropped the proceedings initiated under the Show Cause Notice dated 22.11.2012. Aggrieved, the Department then filed appeal with the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin on the grounds that there is no provision in Drawback Rules. 1995 and Circular numbered 3/99-Customs dated 03.02.1999 and 41/2005-Customs dated 28.10.2005 for inclusion of Basic Customs Duty paid through debit in DEPB scrips for allowing drawback. The Commissioner(Appeals) vide Order-in-Appeal No. 79/2014-Cus dated 18.06.2014 allowed the departmental appeal.

3. Being aggrieved, the Applicant then filed the current Revision Application on the following grounds :

(i) The Commissioner has passed the impugned order without considering the grounds given in the cross objection filed and submissions made at the hearing, especially the contents of the Board's Circular No.26/2007-Customs dated 20.07.2007.

(ii) The definition of drawback in the Drawback Rules 1995, Rule 2(a), includes all duties paid on imported materials used in manufacturing the export product, besides the duties paid for excisable materials used and tax paid on taxable services used. There is neither any restriction that duty should have been paid in cash, nor is there any specific exclusion of duty paid by debit to DEPB scrip in the definition. Hence fixation of the brand rate of drawback including the basic duty of customs paid through debit to DEPB scrip in the Applicant's case was quite in order.

(iii) In the case of Dorf Ketal Chemicals (I) Pvt Ltd which was relied upon by the Commissioner (Appeals), it is seen mentioned in Para 8 therein, that as per proviso (ii) to Rule 3 of the Drawback Rules 1995, brand

rate of drawback is admissible only against cash payment of duties. The proviso is quoted below for ready reference.

> *"Provided further that no drawback shall be allowed-*
>
> *i) If the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture*
>
> *ii) if the said goods are produced or manufactured, using imported materials or excisable materials or taxable services in respect of which duties and taxes have not been paid; "*

(iv) From the above it can be seen that in the proviso, nowhere it has been mentioned that the drawback to be allowed only against cash payment of duty. In the Applicant's case, the dispute is regarding basic customs duty (BCD) paid for the imported materials used. The duty for the imported pepper oil used, was paid through debit to DEPB scrip. The audit pointed out that basic customs duty paid through debit to DEPB could not be considered for fixation of brand rate, in the absence of any instructions to that effect, unlike the instructions issued for additional duty of customs. But the Board's Circular No.26/2007-Customs dated 20.07.2007 clearly points out that imported goods cleared on payment of duty through DEPB are not to be considered as exempted but duty paid goods. Once it is considered as duty paid, all the duties paid have to be considered for fixing the brand rate.

(v) The proviso (ii) in question does not mention that payment of duty through DEPB will not be considered as payment of duty nor is there any restriction that duty has to be paid in cash. The Drawback Rules, 1995 have been notified under a notification and will have precedence overy any instructions issued through circulars. Circulars are only to clarify the provisions of the Rules and cannot prescribed anything contrary to the Rules. Hence so long as there is no instructions in the Drawback Rules regarding duty payment through DEPB, the duty paid through DEPB also has to be considered for fixation of brand rate. The Board's Circular No.26/2007-Customs dated 20.07.2007, in directing that goods cleared on payment of duty by debit to DEPB to be

considered as duty paid goods, confirms this as well. In this regard they relied on few case laws.

(vi) In view of above, the payment of basic customs duty through debit to DEPB should be considered as cash payment and hence correctly considered for fixation of brand rate of drawback in the applicant's case.

(vii) The Applicant prayed that basic customs duty paid by debit to DEPB has also to be considered for fixation of the brand rate of drawback and consequently the brand rate fixed in the Applicant's case is in order.

4. A personal hearing in the case was held on 05.12.2019 which was attended by Shri Jose Jacob, Advocate on behalf of the Applicant. The Applicant requested to set aside the Order-in-Appeal.

5. 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.

6. The issue to be determined in the current case is whether the Basic Customs Duty(BCD) paid through debit of the DEPB scrips are allowable as brand rate of drawback or not.

7. Government finds that subsequent period was challenged by the Applicant in WP(C) No. 30543 of 2018 before Hon'ble Kerala High Court, which followed Gujarat High Court decision in the case of Ratnamani Metals and Tubes Ltd. Vs UOI [2016 (339) ELT 509(Guj)] and hence on date there is no issue.

> *"2. Ratnamani Metals and Tubes Ltd. Vs Union of India Through Joint Secretary's decision is on identical issue. And I dispose of this writ petition applying the same ration."*

Further, the relevant paras of the Hon'ble Gujarat High Court decision in the case of Ratnamani Metals and Tubes Ltd. Vs UOI [2016 (339) ELT 509(Guj)] is reproduced below:

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

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

18. We may recall, in the circular dated 28.10.2005 it was clarified that hitherto additional customs duty paid in cash only was adjusted as Cenvat credit or duty drawback and the same paid through debit under DEPB was not allowed as duty drawback. However, with effect from 1 9 2004, Foreign Trade Policy provided that additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as Cenvat credit or duty drawback as per the rules. It was in this background provided that additional customs duty paid through debit under DEPB shall also be allowed as brand rate of duty drawback. Thus, the Foreign Trade Policy removed restrictions on additional customs duty being adjusted against Cenvat credit or duty drawback, unless paid in cash. A corresponding clarification was issued. This clarification cannot be seen in reverse as to eliminate the facility of drawback when basic customs duty has been paid through DEPB scrip.

19. The case of imports under different other schemes substantially stand on the same footing. Though as is bound to be, terms of each scheme are different. In case of VKGUY, the foreign policy provides for incentive with the objective to compensate high transport costs and offset other disadvantages to promote exports of various products specified therein which include the agricultural produce, minor forest produce, Gram Udyog products, forest based products etc. In case of such exports, the incentive is made available in form of duty credit scrip at the rate of 5% of the FOB value of the

exports. Likewise, in case of FMS, it is provided that same is to offset high freight cost and other externalities to select international markets to enhance India's export competitiveness in these markets. Specified product exported to specified countries qualify for such benefits. Duty credit scrip at the specified rate of the FOB value of the exports would be provided. In case of FPS, the objective is to promote export of products which have high export intensity/employment potential so as to offset infrastructural inefficiencies and other associated costs involved in marketing of these products. In this scheme also, exports qualify for duty credit scrip at the rate of 2% or 5% of the FOB value as provided in the notification. It can thus be seen that in all these cases, for different reasons the Government of India provides export C/SCA/10826/2018 JUDGMENT incentives at specified rates of the value of the exports. The intention is to make the exports viable, more competitive and to neutralise certain inherent handicap faced by the industry in the specified areas. These export incentive schemes have nothing to do with offset of duty element of imported raw materials or inputs used in export products, unlike as in the case of DEPB.

20. Thus, under these schemes, the Government of India having realised that exports in question require added incentive, provides for the same in form of credit at specified rate of FOB value of the export which credit can be utilised for payment of customs duty. To disqualify such payment for the purpose of duty drawback would indirectly amount to denying the benefit of the export incentive scheme itself.

21. Judgement of this Court in case of Gujarat Ambuja Exports Ltd(supra), was rendered in different background. The question there was chargeability of education cess which was calculated at the rate of 2% on the aggregate of duty of customs levied and collected by the Central Government. In this background, question arose where the imports are made under DEPB scheme, would education cess be applicable. Noticing that subject to adjustment in DEPB scrip, the imports are made exempt from payment of duty, it was held that there cannot be education cess on such imports. The issue in the present case is vastly different.

22. Likewise, the decision of learned Single Judge of Madras High Court relied upon by the counsel for the Revenue in case of Associated Autotex Ancillaries P.Ltd. v. Joint Secretary, MF reported in 2007(211) ELT 368(Mad), did not concern the present controversy. In the said case, it was held that modification by circular dated 28.10.2005 would be prospective and the clarification of brand rate of duty drawback C/SCA/10826/2018 JUDGMENT would be available also in relation to additional customs duty paid through DEPB, would have no retrospective effect.

23. In the result, both the petitions are allowed. Impugned orders are reversed. Proceedings are placed back before the original authority for fixation of brand rate of duty in each case. Petitions are disposed of."

8. Since the issue raised in the current Revision application is identical, relying on the afore mentioned ratio, Government finds that the current case/ issue is Res-Judicata.

9. In view of the above, Government upholds the Assistant Commissioner(CUS Tech), Cochin Order-in-Original No. 1/2013 CUS TECH dated 02.01.2013 and sets aside the impugned Order-in-Appeal No. 79/2014-Cus dated 18.06.2014 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin.

10. The Revision Application is allowed in terms of above.

11. So, ordered.

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

ORDER No. 131/2020-CX (WZ)/ASRA/Mumbai Dated 10.08.2020.

To,
M/s Synthite Industries Ltd.,
Synthite Valley,
Kolenchery,
Ernakulam,
Kerala – 682 331.

Copy to:
1) Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin
2) The Commissioner of Central Excise, Customs & Service Tax, C.R. Building, I.S. Press Road, Cochin-18.
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file
5) Spare Copy.