F.No.198/02 & 03/13-RA

REGISTERED
SPEED POST

सत्यमेव जयते

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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F.No.198/02 & 03/13-RA/221 Date of Issue: 03/05/2018

ORDER NO. 143-144 /2018-CX (WZ)/ASRA/MUMBAI DATED 27.04. 2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of Central Excise, Pune-III Commissionerate

Respondent : M/s ISMT Ltd., Pune.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. PIII/RP/220 to 225/2012 dated 28.09.2012 and No. PIII/RP/276 to 281/2012 dated 07.12.2012 passed by the Commissioner (Appeals), Central Excise, Pune-III.

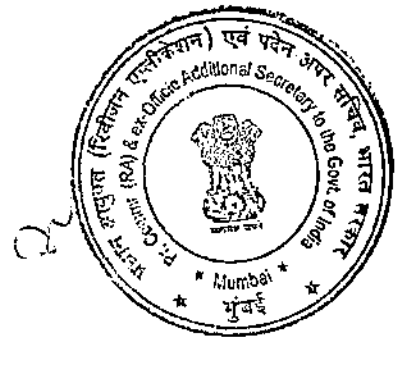
ORDER

These revision applications are filed by the Commissioner of Central Excise, Pune-III (hereinafter referred to as "the applicant") against the Orders in Appeal No. No. PIII/RP/220 to 225/2012 dated 28.09.2012 and No. PIII/RP/276 to 281/2012 dated 07.12.2012 passed by the Commissioner (Appeals), Central Excise, Pune-III.

2. The issue in brief is that the respondent is engaged in manufacture of Seamless metal tubes and pipes falling under Chapter 73 of the first schedule to the Central Excise Tariff Act, 1985, had filed six separate rebate claims under Rule 18 of Central Excise Rules, 2002 read with Section 11B of Central Excise Act, 1944 for different amounts on the ground that they had exported their finished goods on payment of Central Excise duty, under Rule 18 of the said Rules.

3. While passing the impugned Orders-in-Original, the adjudicating authority sanctioned full amount of rebate claims, however, part of the sanctioned amounts were sanctioned by way of allowing the respondent to take CENVAT credit in their CENVAT account on the grounds that in certain cases, the respondent had shown higher value in the ARE-1 and Excise invoice than the FOB value shown in the shipping bills and have thus paid excess excise duty at the time of clearance of goods for export. The Ld. Adjudicating Authority also observed that in certain cases the ARE-1 and Excise Invoice Value was lower than the FOB Value and in those cases, the entire rebate amount has been sanctioned in cash.

4. Being aggrieved with the above, the respondent preferred an appeal with the appellate authority, who, vide impugned appellate order, held that the respondent is entitled for the entire amount of rebate in cash in all these appeals.



5. Being aggrieved, the Department filed aforementioned revision applications against the impugned Order in Appeal on the following common grounds that :-

5.1 Commissioner (Appeals) has erred in not considering the fact that the value of the goods exported is to be determined under Section 4 of the Central Excise Act, 1944 on which the duty of excise is to he paid by the assessee. As per the Act, the value ot the goods is to be taken as transaction value for purpose of payment of excise duty, when the goods are sold lor delivery at the time and place ot removal.

5.2 The transaction value under Section 4 of the Central Excise Act 1944 is the price actually paid or payable for the goods when sold. In the present case, the FOB value as shown as the Shipping bill is a transaction value under Section 4 of the Act and not the value mentioned in ARE-1. The assessee are 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 CIF value of the goods as prescribed under Section 4 of the Central Excise Act, 1944. The assessee should have paid the duty on the FOB value as shown in the Shipping bill, which is the transaction value in the present case under Rule 18 of Central Excise Rules. The rebate of Central Excise duty by way of cash would be admissible of the amount of duty, which is paid on the FOB value as shown in the Shipping bill i.e. the transaction value. If any, excess amount paid as duty on the goods exported, cannot be treated as duty paid and hence rebate of the same cannot be allowed in cash under Rule 18 of Central Excise Rules. The Commissioner (Appeal) has erred in allowing the rebate of duty in cash of the excess amount of duty paid by the assessee. As any excess amount paid as duty on the goods exported cannot be treated as duty paid and, therefore,

rebate claimed by the assessee of the same cannot be allowed in cash under Rule 18 of Central Excise Rules.

5.3 Since the entire duty has been paid by the assessee from the CENVAT credit account, the excess duty paid by the assessee would constitute an amount which has been erroneously paid and is liable to be refunded to the assessee as duty erroneously paid in terms of Section 11 B of the central Excise Act and or also in the manner in which it was paid. In this case, since the duty is paid from the CENVAT account. the assessee should have been allowed to take back the excess amount of duty paid in CENVAT credit account instead of cash.

5.4 The rebate sanctioning authority has correctly restricted the amount of rebate claim sanctioned in cash.

5.5 A recent Revision Application order No. 1757-1765/2012-CX dated 18.12.2012 of Government of India passed by Joint Secretary to the Govt. of India under Section 35 EE of CEA, 1944 on a similar issue in the case of M/s Sulzer India Ltd, Pune. The Govt. is of the view that the excess paid amount of duty which is not held admissible for being rebated under Rule 18 of Central Excise Rules, 2002, is to be allowed as re-credit in the CENVAT credit account from where said duty was initially paid and Govt. has rejected the revision application filed by the assessee.

6. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. Respondent vide letter dated 02-03-2013 filed following identical written submissions in both revision applications :-:

6.1. That the excise duty is payable on the transaction value u/s 4 of CEA, 1944 and in their case the transaction value is the normal transaction value, known at the time of removal of the goods from

the factory premises to port, of ARE-1 on which applicable excise duty is paid by them under rule 18 of Central Excise Rules, 2002 correctly. The value, mentioned in ARE-1, is the contracted price, in foreign currency, which is converted into Indian currency based on the exchange rate published by customs notification every month for a particular period. Whereas the value, in Shipping Bill, is derived at port, meant for customs purpose only, and this value is not known by them at the time of removal of the goods from factory, therefore, the value of Shipping Bill has no relevance and the value mentioned in the ARE-1 is the transaction value for discharging excise duty liability u/r 18 of CER, 2002 and they have also submitted the proof of the collection from the overseas customer's amount in foreign currency equivalent to the invoiced amount.

6.2. That they have neither paid short excise duty or in excess as required to be valued under section 4 of CEA, 1944 and claimed the rebate thereafter which is allowed by the Commissioner (Appeals), is proper and correct.

6.3. they have been alleged that the entire duty has been paid by them from the CENVAT credit account and the excess duty paid would constitute an amount which has been erroneously paid and is liable to be refunded as duty erroneously paid in terms of Section 11B of CEA and or also in the matter which it was paid. They would like to draw kind attention towards the explanation of 8 (4) of CER, 2002 which reads as "For the purposes of this rule, the expression 'duty' or 'duty of excise' shall also include the amount payable in terms of the CENVAT Credit Rules. 2004". Board has also clarified it vide Circular No. 687/3/2003-CX, dated 3-1-03 that even though duty was paid through credit account the rebate should be granted in cash only. Further Honourable CESTAT Mumbai in the case of Bharat Chemicals v. CCE, Thane

reported in 2004 (170) E.L.T. 568 (Tri.-Mumbai) has held that rule relating to rebate makes no distinction based on the source or manner of payment of duty. Going through the above explanation it is very dear that any duty of excise can be paid by way of Cenvat Credit and the allegation of erroneous payment of excise duty is not sustainable.

6.4. The adjudicating authority has alleged that they should have paid duty on FOB and not on CIF value. The FOB value shown in the Shipping Bill is the transaction value on which duty is liable to be paid. The adjudicating authority has erred in determining the place of removal assuming that for the purpose of export the factory gate is the place of removal not the port. The similar case was appealed before the GOI wherein the GOI observes that "from the perusal of the provisions of Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 it is clear that place of removal may be factory / warehouse, a depot, a premise of consignment agent or any other place of removal. The meaning of "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India.

6.5 The reason of such conclusion is that as per Section 1 of CEA, 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 leading the export goods. Under such circumstances, the place of removal is the port of export where sale takes place".[Ref. 2012(281) E.L.T. 738 (G.O.I.)], Bangalore Tribunal, in case of M/s Kuntal Granite Ltd. Vs Commissioner of Central Excise Bangalore has clarified that "In case of export of goods the

place of removal is the place where the documents are presented to the Customs officers for export and not the factory gate" [Ref. 2012(281) E.L.T. 738 (G.O.I.)].

6.6 From the above it is very clear that the excise duty has been correctly discharged by as on the transaction value i.e. the value of ARE-1 which includes the admissible elements calculated and considered upto the place of removal. The Commissioner (Appeals) has rightly sanctioned the rebate in cash and therefore it is requested that the Revision Application, under Section 3SEE of the CEA, 1944, of the adjudicating authority should not be considered at all. In the light of the decisions, cited above, the remaining pending orders, wherein partial rebate amount has been sanctioned by way of CENVAT Credit, may kindly be ordered to be allowed in cash.

7. A personal hearing in the both the revision applications was held on 15.01.2018. Shri C.V. Gaikwad, Supdt., Baramati Division, Range-II duly authorized, appeared on behalf of the applicant and reiterated the submissions made in the two revision applications filed by the department. In view of the same he pleaded that Order in Appeal be set aside and revision applications be allowed.

8. The issue involved in all these Revision Applications being common, they are taken up together and are disposed off vide this common order.

9. 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.

10. Government notes that the Adjudicating authority in his order has observed that in some cases the respondent has paid excess excise duty at the time of export of their product; that the duty was required to be paid on the

FOB Value and the amount of rebate claim pertaining to the said excess payment i.e. the difference between the ARE-1 value and FOB value was allowed in the form of CENVAT Credit in their CENVAT account.

11. Government observes that Commissioner (Appeals), on the other hand has mainly relied on clarification issued in Board Circular No.510/06/2000-CX dated 03.02.2000 and Circular No.687/3/2003-CX dated 03.01.2003 to arrive at a conclusion that the duty paid through the actual credit or deemed credit account on the goods exported must be refunded in cash.

12. Government observes that the relevant statutory provisions for determination of value of excisable goods have been duly examined in GOI order No.97/2014-Cx dated 26.03.2014 In Re:Sumitomo Chemicals Pvt. Ltd. [2014(308) E.L.T. 198 (G.O.I.)] which are reproduced below for proper understanding of the issue of valuation:-

> ***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 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*** *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)(c)(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 up to 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 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 :-

"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 :-

Assessable value' "7. 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.

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."

13. Government observes that the Commissioner (Appeals) in his impugned order has relied upon Board Circular No.510/06/2000-CX dated 03.02.2000 and Circular No.687/3/2003-CX dated 03.01.2003. Government observes that the respondent in their counter reply relied upon C.B.E. & C. 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 and therefore said Circular issued prior to the introduction of transaction value concept, cannot be strictly applied after 1-7-2000. Further, as per para 3(b)(ii) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, 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 in part as the case may be depending on facts of the case. 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 in order. Therefore, the circular of 2000 cannot supersede the provisions of Notification No. 19/2004-C.E. (N.T.).

14. Government observes that the respondent in their counter reply to the revision applications filed by the department has stated that

"the excise duty is payable on the transaction value u/s 4 of CEA, 1944 and in their case the transaction value is the normal transaction value, known at the time of removal of the goods from the factory premises to port, of ARE-1 on which applicable excise duty is paid by them under rule 18 of Central Excise Rules, 2002 correctly. The value, mentioned in ARE-1, is the contracted price, in foreign currency, which is converted into Indian currency based on the exchange rate published by customs notification every month for a particular period. Whereas the value, in Shipping Bill, is derived at port, meant for customs purpose only, and this value is not known by them at the time of removal of the goods from factory, therefore, the value of Shipping Bill has no relevance and the value mentioned in the ARE-1 is the transaction value for discharging excise duty liability u/r 18 of CER, 2002 and they have also submitted the proof of the collection from the overseas customer's amount in foreign currency equivalent to the invoiced amount. That they have neither paid short excise duty or in excess as required to be valued under section 4 of CEA, 1944 and claimed the rebate thereafter which is allowed by the Commissioner (Appeals), is proper and correct. The adjudicating authority has alleged that they should have paid duty on FOB and not on CIF value. The FOB value shown in the Shipping Bill is the transaction value on which duty is

liable to be paid. The adjudicating authority has erred in determining the place of removal assuming that for the purpose of export the factory gate is the place of removal not the port. The similar case was appealed before the GOI wherein the GOI observes that "from the perusal of the provisions of Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules 2000 it is clear that place of removal may be factory / warehouse, a depot, a premise of consignment agent or any other place of removal. The meaning of "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 CEA, 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 leading the export goods. Under such circumstances, the place of removal is the port of export where sale takes place".[Ref. 2012(281) E.L.T. 738 (G.O.I.)], Bangalore Tribunal, in case of M/s Kuntal Granite Ltd. Vs Commissioner of Central Excise Bangalore has clarified that "In case of export of goods, the place of removal is the place where the documents are presented to the Customs officers for export and not the factory gate" [Ref. 2012(281) E.L.T. 738 (G.O.I.)]. From the above it is very clear that the excise duty has been correctly discharged by as on the transaction value i.e. the value of ARE-1 which includes the admissible elements calculated and considered upto the place of removal".

15. In the instant case, original authority has held that duty was paid on CIF value and the same was required to be paid on FOB value. Government notes from the Orders in Original that the original authority has not determined the place of removal in this case. Therefore, the factual details regarding place of removal as submitted by the respondent in their cross objections are required to be verified to determine the transaction value under Section 4(i)(a) of Central Excise Act, 1944. Under such circumstances, Government remands the cases back to the original authority to decide them afresh after conducting the requisite verification as stated above. A reasonable opportunity of hearing is to be provided to the respondents before deciding the same. The respondent

would be eligible to rebate of the duty paid on value of exported goods as determined under Section 4(1)(a) of Central Excise Act, 1944.

16. Government accordingly, sets aside the impugned order-in-appeal.

17. Revision Applications are disposed off in above terms.

18. So, ordered

(ASHOK KUMAR MEHTA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 143-144/2018-CX (WZ)/ASRA/Mumbai DATED 27.4.2018.

To,
Commissioner of Central Goods and Service Tax,
Pune-II,
GST Bhavan, 41/A Sasoon Road,
Pune-411 001.

True Copy Attested

1/5/18
एस. आर. हिरूलकर
S. R. HIRULKAR
(A-C)

Copy to:

1. Commissioner, Central GST, (Appeals-I) PUNE, "F" wing, 3rd Floor & "C" wing, 3rd Floor, GST Bhavan, 41/A, Sassoon Road, Pune 411001.
2. M/s ISMT Ltd., MIDC, Baramati, Tal: Baramati, Dist: Pune
3. Assistant Commissioner, Central GST, Baramati Division, CFC Center Pencil Chowk, MIDC Baramati-413133
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard File.
6. Spare Copy.