REGISTERED
SPEED POST

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.195/607/2013-RA/2630 Date of Issue: 09.04.2021

ORDER NO.154/2021-CX (WZ)/ASRA/MUMBAI DATED30.03.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. PJ/631/VDR-II/2012-13 dated 29.03.2013 passed by the Commissioner(Appeals) of Central Excise, Customs and Service Tax, Vadodara

Applicant : M/s Philips Carbon Black Ltd

Respondent : Commissioner of Central Excise, Vadodara-II

ORDER

This Revision Application is filed by M/s Philips Carbon Black Ltd., N.H. No.8, GIDC Estate, Palej, Bharuch, Gujarat – 392 220 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. PJ/631/VDR-II/2012-13 dated 29.03.2013 passed by the Commissioner(Appeals) of Central Excise, Customs and Service Tax, Vadodara.

2. The issue in brief is that the Applicant, manufacturer had exported their finished goods under claim of rebate in terms of Rule 18 of Central Excise Rules and filed 25 rebate claims dated 19.02.2010 total amounting to Rs. 51,89,497/-. The rebate claims were sanctioned by the Deputy Commissioner, Central Excise and Customs, Div. Bharuch vide Order-in-Original DIV/BRH/3433 to 3457/R/09-10 all dated 25.03.2010. During the course of post audit of the rebate claims, it was observed that "When the assessable value and FOB value is same, local freight upto the port is also Included in the assessable value. Means the transaction value (assessable value) on which duty is paid is not excluding the local freight upto the port and therefore, the rebate was required to be sanctioned in case to the extent of duty payable on transaction value (assessable value) arrived at after deducting the amount of the local freight upto the port (from the factory to port of export) and the balance amount was allowed to be re-credited in cenvat account". Hence the Range Officer called for information regarding the local freight upto the port charges involved in the assessable value of the 25 rebate claims filed by the Applicant. The Applicant vide their letter dated 21.09.2010 to the Range Office submitted the details. As per the details, it appeared that they had collected total Rs. 18,66,750/- towards local freight i.e. transportation cost from factory to port paid by them and accordingly the total duty involved therein worked out to be Rs. 1,53,820/- which was erroneously refunded to the Applicant in cash and same was required to be recovered under Section 11A of the Central Excise

Act, 1944. Hence the Applicant was issued Show Cause Notice amounting to Rs. 1,53,820/-towards recovery of erroneously rebated amount along with interest and other penal action.

3. The adjudicating authority, Deputy Commissioner, Central Excise and Customs, Div. Bharuch vide Order-in-Original No. DIV/BRH/04/R/11-12 dated 17.12.2011 confirmed and ordered to recover the erroneously refunded amounting to Rs. 1,53,820/- along with interest involved in the 25 rebate claims and imposed penalty of Rs. 1,53,820/- under Section 11AC of the Central Excise Act, 1944.

4. Aggrieved, the Applicant filed appeal with the Commissioner(Appeals) of Central Excise, Customs and Service Tax, Vadodara. The Commissioner(Appeals) vide Order-in-Appeal No. PJ/631/VDR-II/2012-13 dated 29.03.2013 rejected their appeal and upheld the Order-in-Original dated 17.12.2011.

5. Aggrieved, the Applicant then filed the current Revision Application on the following grounds:

(i) There is no form of law for the demand and as the Applicant had rightly availed Rebate Claims on their exported goods, the demand for Excise Duty cannot be upheld and hence the interest and the penalty.

(ii) The Commissioner(Appeals) had erred in observing at para 5 of the Order-in-Appeal that *"in the instant case the transaction value mentioned in Central Excise Invoice and FOB value mentioned in Shipping Bill are same. Hence, it is revealed that the value on which duty was discharged was inclusive of local freight, insurance and other expenses"*. Thus, in other words, the transaction value on which duty is paid is not excluding the local freight up to the port and rebate was required to be sanctioned in cash to the extent of duty payable on transaction value arrived at after deducting the

amount of local freight up to the port (from factory to port of export). Here, the Commissioner(Appeals) had not disclosed any reason for ascertaining this exclusion and also did not assign any cogent reason with relevant provision of law while arriving at this conclusion.

(iii) The Commissioner(Appeals) had erred in finding that the Value in terms of Section 4 of Central Excise Act, 1944 on which central excise duty is required to be paid should be the transaction value viz. the amount that the buyer of the exported goods is liable to pay to the exporter. However, while finding this, the Commissioner(Appeals) had erred in finding that the transportation charges are forming part of the Transaction Value and hence, the excess duty paid is required to be refunded to the Government.

(iv) The Commissioner(Appeals) had erred in placing reliance on the judgment of Sri Bhagirath Textiles Ltd. [2006 (202) ELT 147]. In the cited case the Appellants had paid duty on the basis of CIF price of the goods. Initially, rebate had been allowed for the entire amount of duty paid. As per the Bank Realization Certificate, lesser amount was realized by the exporter. Department initiated action for recovery of the excess amount paid as rebate and the demand of erroneous rebate was confirmed by the lower authority; on appeal filed by M/s. Bhagirath Textiles, the Commissioner (A) set aside the order and allowed the appeal. Against this order the Department filed appeal before the Revisionary Authority, Department of Revenue, Government of India. The Revenue Authority agreed with the contention of the Department that as per provisions of Sections 4(i)(a) and 4(2)(d) of Central Excise Act, 1944, the value in terms of Section 4 should be the amount that the buyer of the exported "goods is liable" to pay. In the instant case, the buyer of the exported goods had paid an amount as shown in the Bank realization certificate. In any case the respondents 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

transaction value of the goods as prescribed under Section 4 of the Central Excise Act, However, it is also fact that the respondents have paid excess duty to the tune of Rs. 2,35,192/- which is to be refunded to the respondents in the manner in which it was paid. While placing reliance on above judgment, the Commissioner(Appeals) did not consider that in that case the Transaction Value and Realized Value were different but in the current case the Transaction Value and the Realized Value both are same hence the said case is not applicable to the current matter and hence the finding given based on the said judgment is not acceptable to the Applicant.

(v) The Commissioner(Appeals) erred in finding that the case laws relied upon by the Applicant -

    (a) The Hon'ble Apex Court in the case of CC, Kanpur Vs. M/s Kothari Products Ltd. [2008 (229)ELT 12(SC)] and

    (b) Hon'ble Bombay High Court in case of Bombay Chemicals Ltd. [2006 (201) ELT 167 (Bom)]

    was not of relevance as the said judgments are not identical to the instant case and the present case is relevant with the mis-declaration of freight up to port. The Commissioner(Appeals) had erred by not discussing the reason how the said case laws are not relevant. Simple denial to accept the case law by mentioning that the said case laws are not applicable is not the justifiable ground.

(vi) The SCN was totally based on the wrong interpretation of the letter submitted by the Applicant. In their letter dated 21.09.2010, the Applicant had mentioned that they had recovered the value of transportation cost through their invoice but that does not mean that they had included the value while arriving at the Transaction Value. The close look at the invoice will reveal that the freight charges have been charged after arriving at the Transaction Value and after adding the amount of excise in the value.

(vii) In light of this, it is clearly seen that the transaction value do not include the amount of freight but it is being added after arriving the transaction value. Therefore, the declaration given by the Applicant that *"We have paid the duty on the Transaction value arrived at after deducting Sea Freight, Road Freight, insurance & port charges & CFR value & other post manufacturing expenses"* is true and correct. Therefore, the allegation that the Applicant had mis-declared the facts was far from the truth and without any corroborative evidence. Further, the ARE-1 was also showing the same amount as been shown in the Export Invoice. In other words, the Transaction Value is same as FOB Value. In other words, when the freight charges are not at all included in the Transaction Value, there is no question of FOB price is inclusive of freight charges. Therefore, the rebate claims filed on the basis of ARE 1 and the Let export order was in order and there was no discrepancy at all and hence the rebate claims filed based on that was also in order and hence there is no question of recovery of any excess amount given as rebate.

(viii) The department had taken a route of issuing the fresh SCN instead of filing the Appeal before the appropriate forum. In other words, if the department had any grievances against the order of lower authority sanctioning the rebate claim, then they could have filed the appeal against the order of said order allowing the rebate. However, the department had failed in doing so within stipulated time frame and hence, they have adopted the new way to challenge the order of the jurisdictional Dy. Commissioner which is not permitted in the eyes of law. In this regard we would like to rely upon the judgment of Hon'ble Supreme Court in the case of M/s. CC, Kanpur Vs. Kothari Products Ltd. reported in 2008 (229) ELT 12 (SC) and judgment of Hon'ble Bombay High Court in case of Bombay Chemicals Ltd. Vs. U01 reported in 2006 (201) ELT 167 (Born.). However, the Commissioner(Appeals) had not even dealt with the ground taken by the Applicant while passing the

order. Thus, the Order-in-Appeal is non speaking order in this regard and hence on this ground alone, the Order-in-Appeal should be dropped.

(ix) The Commissioner(Appeals) had erred in observing at para 6 of the Order-in-Appeal that *"...I have gone through the sample invoices, ARE-1, and shipping bills submitted by the appellant, wherein it is absolutely clear that the transaction value and FOB value are same. Therefore, transaction value is inclusive of local freight."* . The Applicant failed to understand from which sample invoices the Commissioner(Appeals) had found the transaction value inclusive of local transportation cost. In fact, the sample invoices submitted by the Applicant clearly indicates that the FOB value and the CIF value is different and they had claimed the rebate only on FOB Value which is excluding the local transportation cost and insurance cost. Therefore, the finding given by the Commissioner (Appeals) was vague and without any evidence.

(x) When there was no liability of recovery of rebate granted to the Applicant, then

there is no question of payment of Interest on the said amount u/s 11 AB of Central Excise Act, 1944. And when there is no liability of recovery of rebate granted to the Applicant, then there is no question of payment of Penalty u/s 11 AC Central Excise Act, 1944.

(xi) The Applicant prayed that the impugned Order-in-Appeal be set aside and the demand of Rebate amount sanctioned, interest & penalty from the Appellant be quashed.

6. The Assistant Commissioner, Central Goods & Service Tax, Division-VII, Bharuch vide letter dated 05.11.2019 submitted the following submissions:

(i) In a similar issue in the case of Sri Bhagirath Textiles Ltd, reported in [2006(202) ELT 147], the appellants had paid duty on the basis of CIF price of the goods. Initially, rebate had been allowed for the entire amount of duty paid. As per the Bank Realization Certificate, lesser

amount was realized by the exporter. Department initiated action for recovery of the excess amount paid as rebate and the demand of erroneous rebate was confirmed by the lower authority; on appeal filed by M/s. Bhagirath Textiles, the Commissioner(A) set aside the order and allowed the department filed appeal. Against this order, the department filed appeal before the Revisionary Authority. The relevant portion of the decision by the Revisionary Authority is as follows: -

> *"8.4...... Govt., therefore, would agree with the contention of the applicant Commissioner that as per provisions of Sections 4(1)(a) and 4(2)(d) of Central Excise Act, 1944 the value in terms of section 4 should be the amount that the buyer of the exported goods is liable to pay. In the instant case, the buyer of the exported goods had paid an amount as shown in the Bank Realization Certificate. In any case the respondents are not liable to pay Central Excise duty on transaction value of the goods as prescribed under Section 4 of Central Excise Act, 1944. However, it is also fact that the respondents have paid excess duty to the tune of Rs. 2,35,192/- which is to be refunded to the respondents in the manner in which it was paid.*
> *8.5. In view of facts and circumstances, Govt., is of the considered opinion that the impugned Order-in-Appeal Govt. also permits the respondents to take back the Cenvat credit of Rs. 2,35,192/- which is related to Central Excise duty paid on CIF value of the impugned goods."*

(ii) The issue to be decided is whether the rebate in cash is admissible on duty paid on local freight, insurance and other expenses included in transaction value mentioned in Central Excise invoice or otherwise. In the instant case it was observed that transaction value mentioned in Central Excise invoice and FOB value mentioned in shipping bill are same. Hence, it was revealed that the value on which duty was discharged was inclusive of local freight, insurance and other expenses.

(iii) Further, Applicant relied upon judgment of Sri Bhagirath Textiles Ltd., [2006(202) ELT 147] but this decision does not rescue them, as in Para 8.5 they categorically held that "*Govt., also permits the respondents to take back the Cenvat Credit of Rs. 2,35,192/- which is related to Central Excise duty paid on CIF value of the impugned goods.*"

(iv) In view of the above, the Department requested to kindly consider their above submissions.

7 Personal hearing fixed for 26.04.2018, 07.11.2019 and 03.10.2019, but no one appeared for the hearing. Still in view of a change in the Revisionary Authority, hearing was granted on 07.01.2021, 14.01.2021, 21.01.2021 and 25.02.2021, however none appeared for the hearing. Hence the case is taken up for decision on merits.

8. 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.

9. On perusal of records, the Applicant, manufacturer had exported their finished goods under claim of rebate in terms of Rule 18 of Central Excise Rules and filed 25 rebate claims dated 19.02.2010 total amounting to Rs. 51,89,497/-. The rebate claims were sanctioned by the Deputy Commissioner, Central Excise and Customs, Div. Bharuch vide Order-in-Original DIV/BRH/3433 to 3457/R/09-10 all dated 25.03.2010. During the course of post audit of the rebate claims, it was observed that transaction value mentioned in invoice was including of local freight and accordingly rebate was granted on such amount in cash. Hence the Applicant was issued Show Cause Notice amounting to Rs. 1,53,820/-towards recovery of erroneously rebated amount along with interest and other penal action. The adjudicating authority, Deputy Commissioner, Central Excise and Customs, Div. Bharuch vide Order-in-Original No. DIV/BRH/04/R/11-12 dated 17.12.2011 confirmed the entire demand along with interest and penalty was imposed under Section 11AC of the Central Excise Act, 1944.

10. The relevant statutory provisions for determination of value of excisable goods are extracted below:

(i) As per Section 4(1) of Central Excise Act, 1944

"(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the 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 any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."

(ii) Word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows :

"(h) '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."

(iii) 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."

(iv) 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."

11. 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.

12. In the instant case the Applicant in their rebate claim letter dated 19.02.2010 stated that *"We hereby declare that the market price of excisable goods at time of exportation was not less than the amount of rebate claim of Duty claimed................. We have paid Excise Duty on transaction value arriving at after deducting Sea Freight, Road Freight, Insurance and Port Charges CFR value."* . The Applicant in their Revision Application submitted that *"In light of this, it is clearly seen that the transaction value do not include the amount of freight but it is being added after arriving the transaction value. Therefore, the declaration given by the Appellant that "We have paid the duty on the Transaction value arrived at after deducting Sea Freight, Road Freight, insurance & port charges & CFR value & other post manufacturing expenses" is true and correct. Therefore, the allegation that the Appellant had mis-declared the facts is far from the truth and without any corroborative evidence. Further, the ARE-1 was also showing the same amount as been shown in the Export Invoice. In other words the*

Transaction Value is same as FOB Value. In other words, when the freight charges are not at all included in the Transaction Value, there is no question of FOB price is inclusive of freight charges." Government is in agreement with the Applicant that these charges cannot be included in the value for payment of Central Excise duty to claim rebate of the same.

13. 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 Re: Sumitomo Chemicals India Pvt. Ltd. reported in 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 :-*
>
> > *"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.*
>
> *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."*

14. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case.

15. Government observes that the *Excise Invoice No. 00233 dated 01.01.2010* shows the *value as Rs. 851651.46*, Insurance - Rs. 916.74, Freight - Rs. 9,167.40, the *ARE-1 No. 125/CB/09-10 dated 01.01.2010* shows *value as Rs. 851651.46* and the *Shipping Bill No. 8013352 dated 03.02.2010* shows the *FOB Value Rs. 851651.46*. Government *finds* that the Excise invoice reveals that the

Applicant had paid the Central Excise Duty on the Transaction Value and thereafter the freight charges and Insurance have been charged. Thus the Applicant had correctly claimed the rebate only on the FOB Value which is excluding the transportation cost and insurance cost. Hence there is no liability of recovery of rebate granted to the Applicant.

16. In view of above, Government set asides the Order-in-Appeal No. PJ/631/VDR-II/2012-13 dated 29.03.2013 passed by the Commissioner(Appeals) of Central Excise, Customs and Service Tax, Vadodara.

17. Revision application is allowed in terms of above.

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

ORDER No. 154/2021-CX (WZ)/ASRA/Mumbai DATED 30.3.2021.

To,
M/s Philips Carbon Black Ltd.,
N.H. No.8, GIDC Estate,
Palej, Bharuch,
Gujarat – 392 220.

Copy to:

1. The Commissioner, Central Goods & ST, Vadodara-II, GST Bhavan, Subhanpura, Vadodara – 390 023.
2. Commissioner(Appeals) of Central Excise, Customs and Service Tax, Vadodara.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.