F.No. 195/959/13-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

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Mumbai- 400 005

F NO. 195/959/13-RA/163 Date of Issue: 31.05.2018

ORDER NO. 161 /2018-CX (WZ)/ASRA/MUMBAI DATED 07.05.2018 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 : M/s. Hildose, Shivam Chambers, 106/108, 1st Floor, S.V.Road, Goregaon, Mumbai-400 062.

Respondent : Commissioner of Central Excise (Appeals-II), Mumbai-400051.

Subject: - Revision Applications filed, under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal No. SDK/154/RGD(R)/2013-14 dated 04.09.2013 passed by the Commissioner (Appeals) of Central Excise, Mumbai-III, CBD Belapur, Navi Mumbai.

ORDER

This revision application is filed by M/s. Hildose, Shivam Chambers, 106/108, 1st Floor, S.V.Road, Goregaon, Mumbai-400 062 (hereinafter referred to as "the applicant") against the Order-in-Appeal No SDK/154/RGD(R)/2013-14 dated 04.09.2013 passed by the Commissioner (Appeals) of Central Excise, Mumbai-III with respect to the Order-in-Original No.432/12-13/DC (Rebate)/Raigad dated 16.05.2013 passed by the Deputy Commissioner of Central Excise (Rebate), Raigad.

2. Brief facts of the case are that the applicant is merchant exporter who have filed rebate claim for Rs. 8,28,738/ - (Rupees Eight lakh Twenty Eight Thousand Seven Hundred and Thirty Eight only) under Rule 18 of the CER 2002 read with Notification No.19/2004 CE (NT) dated 6.09.2004 for the duty paid on goods exported. The rebate sanctioning authority observed that in respect of the said rebate claim the assessable value on the ARE -1 were found to be more than the corresponding F.O.B values. Accordingly, rebate was sanctioned to the extent of Rs. 8,15,211 /- instead of the claimed amount of Rs. 8,28,738/- .

3. Being aggrieved by the Order-in-Original, the applicant appeal before the Commissioner (Appeals) on the following grounds:

a) The amount of Rs.67,05,000/-paid to the exporter is transaction value in terms of Section 3(4) of the CEA,1944 and it includes freight and insurance.

b) The definition of transaction value includes outward handling. There is no clarity in terms of the law formulated by CBEC by way of Rules, Notification and Circulars. They are entitled for payment of differential duty amount of Rs.13,527/- with interest.

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

4.1 The foreign buyer's order specifies that goods are purchased on CIF Ashdod basis. Thus order represents composite price value. The Section 4 (d) of the C. Ex. Act, 1944 specifies that outward handling is part of the transaction value. The act of Parliament cannot be changed / modified /amended by way of Rule/ Notification /Circular therefore there is no way that freight & insurance can be deducted from the invoice value to arrive at transaction value in case of composite order value. Now, please refer to the table No. 1 contained in the order passed by the Dy. Commissioner (Rebate). The amount of Rs. 67,05,000 paid to the exporter is transaction value in terms of Section 4 (d) of the C. Ex. Act, 1944 because it does not include any tax or duty but includes freight & insurance. There is no room for any interpretation.

Therefore, we would like to categorically know from the RA,GOI that how any conclusion can be reached beyond the Act of Parliament to say that freight & insurance are not part of the transaction value because the Commissioner (Appeals) has failed to discharge this responsibility.

4.2 the Commissioner (Appeals) is in grave error to conclude that place of removal for export is the port because port is not owned/leased/hired/rented by the exporter. However, the Dy. Commissioner says that the place of removal is on board the vessel. It is difficult to understand that the assessing/departmental officials do not even comprehend the place of removal. Please note that goods are removed from the factory for export & this is the place of removal beyond doubt. Failing this, why the ARE-1 needs to be prepared for the removal of goods for export. Therefore both the Dy. Commissioner/Commissioner (Appeals) have failed to realize the fact that the place of removal is the place of manufacture of goods in this case. Secondly the goods

are sold on CIF Ashdod, Israel & this composite price is the transaction value in terms of Section 4 (d) of the CEA, 1944. There are no two ways about it.

4.3 The Commissioner (Appeals) should at the very least be aware of the basic fact that the law is not a rational code. Just because export incentives are administered on FOB basis, it does not mean that rebate can be administered on that basis. There is no express provision in the law, which says that FOB value of exports determined under Section 14 of the CA, 1962 is the transaction value of the goods for the purpose of assessment & payment of duty under Section 4 of the CEA, 1944.

4.4 The Commissioner (Appeals) should at the very least be aware of the basic fact that the Order-in Original contains table of facts wherein the complete value of the exports is given & the Dy. Commissioner has concluded that the difference between the ARE-1 & the FOB value given in the S/B is the freight & insurance therefore there is absolutely no reason for the exporter to provide any proof on record because the Commissioner (Appeals) cannot go against the facts accepted by the department. However, the export order, S/B & BRC are placed on record as per Annexure 2 & 3. Therefore, the tax invoice/ARE-1 represents the true transaction value & there is no way to reduce the rebate amount.

The applicant, therefore, prayed that:

The Asstt. Commissioner may please be directed to release the rebate withheld through cheque without any delay with interest as per law & pay interest on the delayed refund. Any other consequential relief may please be allowed as per the law.

5. A Personal hearing was held in this case on 19.01.2018 and Shri Rajiv Gupta, Consultant, appeared for hearing on behalf of the applicant and reiterated the submission filed through Revision Application and written submissions along with the case laws filed on the day of hearing. In view of same, it was pleaded that the Order-in-Appeal be set aside.

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.

7. Commissioner (Appeals) while deciding whether rebate can be granted over and above FOB Value, in his impugned order has observed that

> *"under new Section 4 of CEA 1944 , the assessable value is the transaction value at the time and place of removal. Where the place of removal is different from the place of manufacture, the freight (including freight Insurance) incurred on transportation of goods from the place of manufacture to place of removal has to be included for determination of the assessable value. In the instant case the appellants have apparently assessed the goods for payment of duty on the basis of value determined beyond the place of removal. Under Rule 5 of Valuation Rules, 2000 read with Section 4 of CEA 1944, where the price charged is for delivery at a place different than the place of removal the cost of transportation from the place of removal to the place of delivery only has to be excluded. Under Section 4(3) (c) of the Act, 'place of removal' includes depot, place of consignment agent and any other place from where the goods are sold. In the instant case, the place of removal is the port and therefore freight and insurance incurred for transport of the goods and other charges incurred beyond the port of export are not required to be included in the transaction value. Further, I find that the appellants have paid excise duty on the value which is inclusive of freight and other expenses incurred beyond the place of removal. Also, the CBEC vide circular No*

510/06/2000-CX dated 3.2.2000 has clarified that duty on excisable goods is to be paid on the value determined in accordance with Section 4 of the Act and such duty element will be rebated. Hence amount paid over and above the FOB value as duty is the excess amount paid by the appellant which cannot be treated as duty but as a deposit.

8. Government observes that the applicant at para 3 & 4 of additional submissions filed on the date of personal hearing has contended as under :-

3. The issue is already settled by the Apex Court. (in the case of Commissioner of Customs & Central Excise, Aurangabad Vs M/s Roofit Industries Ltd). The Supreme court has said that freight & insurance is subject to duty as transaction value under Section 4 of the C. Ex. Act, once the sale gets conducted i.e. at that point of time the ownership of the goods is transferred from the seller to the buyer. Please specifically refer to the paragraph 13 of the order in particular.

Here, in this case, the same gets completed once the goods are received & accepted by the buyer at Ashdod, Israel thus leaving no doubt for any other interpretation; please see the order issued by the buyer & the certificate placed on record by us. Please see Exhibit 2; the subject certificate very clearly states that the delivery stands completed once the goods are delivered in sound condition at the named destination port & accepted by the buyer in terms of the specification. It is further pertinent to point out that there would be no reason for the case to reach the apex court in case freight & insurance per se are not part of the transaction value on which the duty liability has to be discharged. The freight & insurance can only be excluded once the goods are sold ex works & the delivery accepted by the buyer or agent at that point of time. The Customs broker/transporter who undertakes shipment is not the agent or representative of the foreign buyer. Therefore as per the issue having been settled by the Apex the place of delivery cannot be the Factory

Gate/Port of shipment/On Board the vessel because sale does not stand completed at any of these places. Therefore, the place of sale being Ashdod Israel in this case, the freight & insurance up to the place of delivery/sale is part of the transaction value on which the duty payment has to be made in terms of the law & there are no two ways about it. Lastly, there is no challenge to the facts & contents of the certificate regarding transfer of the title of goods being completed once the buyer received the goods in sound condition & accepts it. Once, this fact is incontrovertible then as per the apex court decision, the freight & insurance are part of the transaction value on which duty liability is correctly discharged.

4. In the present case, the foreign buyer has placed order on CIF basis & the contract represents the composite price of the goods for the delivery of goods at the named destination in the contract i.e. Ashdod. Thus in case of CIF contract, the expenditure on freight & insurance is includible for determination of transaction value as it is in connection with sale and by reason of sale. The freight & insurance is being charged on fixed amount basis/estimated value and as per the definition of transaction value in the statute, freight & insurance i.e. outward handling charges is includible in the transaction value of the goods for determination of excise duty.

Further, it is pertinent to point that the freight is not shown separately in the excise invoice pertaining to the removal of goods for the purpose of exports. The said invoices show the composite price. This composite price is the transaction value as per the C. Ex. Act, 1944 & the binding circular No. 354/81/2000-TRU dtd. 30.6.2000 issued by the CBEC. This is the document, which certifies that composite price correctly shown in the Excise invoice is the true transaction value & the duty liability is correctly discharged.

From the above, Government observes that the applicant in the present application has sought to claim freight and insurance charges incurred beyond the port of export as a part of the transaction value and duty paid on such value is sought to be rebated to them in cash.

9. Government observes that the relevant statutory provisions for determination of value of excisable goods are extracted below:

- *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.

- *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."

- *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.

- *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."

10. 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.

11. Government observes that the applicant has relied on the Hon'ble Supreme Court Order in Civil Appeal No. 5541 of 2004, decided on 23-4-2015 in the case of Roofit Industries Ltd. [2015 (319) E.L.T. 221 (S.C.)] wherein the question of determination of 'place of removal' for the purpose of Central Excise Act, 1944 was considered by the Supreme Court. In this case, the Supreme

Court was considering the issue as to whether the goods were sold at the factory gate or at the premises of the buyer where the seller had arranged for transportation and insurance of the goods during transit. The Supreme Court, vide order dated 23.04.2015 set aside the order of CESTAT and confirmed inclusion of freight, insurance and unloading charges in the assessable value for excise duty under Section 4 of the Central Excise Act, 1944, thus holding the buyers' premise to be 'the point of sale'.

At para 11 & 12 of the said Order the Hon'ble Supreme Court has observed as under :

> *11. In Commissioner of Central Excise, Noida v. Accurate Meters Ltd. - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), the Court took note of few decisions including in the case of Escorts JCB Ltd. and reiterated the aforesaid principles by emphasizing that the place of removal depends on the facts of each case.*
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> *12. The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with Valuation Rules.*

12. Government further notes that CBEC vide Circular No. 988/12/2014-CX dated 20.10.2014 has clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of Transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where

the sale has taken place or when the property of goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

13. Government observes that in the case of Commissioner of Central Excise, Aurangabad v. Roofit Industries Ltd. (referred to at para 11 above), the fact was that the assessee has received a work order from various Government authorities and private contractors and the agreements entered into by the assessee with the above mentioned parties were for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. The agreement required the assessee, for delivery of the finished goods not at the factory gate, but the premises of the buyer. The Apex Court held after going through the terms and conditions of the contract, it is clear that the goods have to be delivered at the place of buyer and it was only at that place where the acceptance of supplies was to be effected and as such price or transaction value are inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges. However, in the instant case the applicant is claiming the freight & insurance i.e. outward handling charges incurred beyond the place of removal i.e. port of export and hence ratio of the Hon'ble Apex Court Order in the case of Roofit Industries Ltd. (supra) cannot be made squarely applicable to the present case.

14. Government further observes that the Ministry has further clarified vide its Circular No. 999/6/ 2015-CX, dated 28-2-2015 what is the "place of removal" for taking CENVAT credit of services used for export of goods for two types of exports, one for direct export and another for deemed export. Place of removal for direct export is mentioned in para 6 as under;

> *6. "In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such*

situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer Exporter and ***place of removal would be this Port/ICD/CFS.*** *Needless to say, eligibility to CENVAT Credit shall be determined accordingly."*

Whereas for deemed export it is mentioned in para 7 as under;

7. In the case of export through merchant exporters, however, two transactions are involved. First is the transaction between the manufacturer and the merchant exporter. The second transaction is that between the merchant exporter and the foreign buyer. As far as Central Excise provisions are concerned, the place of removal shall be the place where the property in the goods passes from the manufacturer to the merchant exporter. As explained in paragraph 4 supra, in most of the cases, this place would be the factory gate since it is here that the goods are unconditionally appropriated to the contract in cases where the goods are sealed in the factory, either by the Central Excise officer or by way of self-sealing with the manufacturer of export goods taking the responsibility of sealing and certification, in terms of Notification No. 19/2004-Central Excise(N.T.) dated 6.9.2004, etc.

8. However, in isolated cases it may extend further also depending upon the facts of the case ***but in no case, this place can be beyond the Port / ICD / CFS where shipping bill is filed by the merchant exporter.*** *The eligibility to CENVAT Credit shall be determined accordingly.*

15. Moreover, Government observes that GOI in its Orders No. 411-430/13-Cx dated 28.05.2013 In Re: M/s GPT Infra Projects Ltd. and Order No. 97/2014-Cx dated 26.03.2014 In re : Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] has categorically held that

"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. It can either be factory, warehouse or port/Customs Land Station of export and expenses of freight / insurance etc. incurred upto place of removal form part of assessable value. Under such circumstances, the place of removal is the port/place of export since sale takes place at the port /place of export.

At para 9 of its Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] GOI held that

"9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above. Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

16. In view of the facts and discussion herein above, Government observes that in this case the applicant is a Merchant exporter and hence the place of removal shall be the place where the property in the goods passes from the manufacturer to the merchant exporter and transaction value is required to be arrived at accordingly, but in no case, this place can be beyond the port of export. Accordingly, Government holds that freight and insurance for transport of goods and other charges incurred beyond port of export cannot be part of the transaction value.

17. In view of the above, Government finds no legal infirmity in the impugned Order-in-Appeal and hence upholds the same.

18. The revision application is, therefore, rejected being devoid of merit.

19. So, ordered.

7.5.18

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

ORDER No.161/2018-CX (WZ) /ASRA/Mumbai DATED 07.05.2018.

True Copy Attested

To,
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9/5/18

एस. आर. हिरूलकर
: S. R. HIRULKAR

Copy to

1. The Commissioner of GST & CX, Raigad Commissionerate.
2. The Commissioner, Central Excise, (Appeals) –II, 3rd Floor, GST Bhavan, BKC, Bandra (E), Mumbai-400051.
3. The Deputy / Assistant Commissioner (Rebate), Central Excise building, Plot no. 1, Sector-17, Khandeshwar, Navi-Mumbai -410206.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.