F. No. 380/83/DBK/14-RA
F. No. 380/74/DBK/14-RA
F. No. 380/80/DBK/14-RA
F. No. 380/66/DBK/14-RA

REGISTERED SPEED POST AD

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
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. 380/83/DBK/14-RA
F. No. 380/74/DBK/14-RA
F. No. 380/80/DBK/14-RA /5532
F. No. 380/66/DBK/14-RA

Date of Issue: 02.10.2020

ORDER NO. 162-165 /2020-CUS (WZ) /ASRA/MUMBAI DATED 01.09.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs
Custom House,
Kandla

Respondent : M/s Laxmi Ventures (I) Ltd.
36/40, Mahalaxmi Bridge Arcade,
Mahalaxmi, Mumbai
& Three Others

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla.

ORDER

These revision applications have been filed by the Commissioner of Customs, Kandla(hereinafter referred to as "the applicant" or "the Department") against OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla in the case of M/s Laxmi Ventures (I) Ltd.(hereinafter referred to as "the respondent no. 1").

2.1 M/s Laxmi Ventures (I) Ltd., 36/40, Mahalaxmi Bridge Arcade, Mahalaxmi, Mumbai(hereinafter referred to as "respondent no. 1") are engaged in the export of agriculture products including Soya Bean De Oiled Cake(hereinafter referred to as DOC) in the year 2006-07, 2007-08 falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975. Shri Akash Agrawal(hereinafter referred to as "respondent no. 2") was the Director in respondent no. 1 firm at the relevant time. All the activities of the respondent no. 1 and respondent no. 3 relating to export and availment of duty drawback had taken place as per his directions. The said respondent no. 1 had exported Soya De Oiled Cake from Kandla Port falling under the jurisdiction of the Commissioner of Customs, Kandla under claim of drawback.

2.2 M/s Laxmi Solvex Ltd., Durgapura, Dewas(A Division of M/s Laxmi Ventures (I) Ltd. - hereinafter referred to as "respondent no. 3"), is a manufacturer engaged in the manufacture of soya oil and soya DOC by solvent extraction process using hexane as solvent in their factories and had sold the said DOC to the respondent no. 1 which was exported by respondent no. 1 by availing the facility of duty drawback. Shri V. V. Sunil(hereinafter referred to as "respondent no. 4") is the Manager of M/s Laxmi Solvex Ltd(respondent no. 3).

2.3 An intelligence gathered by the Directorate General of Central Excise Intelligence(DGCEI) , Regional Unit, Indore indicated that the respondent no. 1 had exported the DOC falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975 from Kandla Port by availing the benefit under Duty Drawback. The said DOC was purchased by them from the

manufacturers who had manufactured the same by availing the benefit under Rule 19(2) of the CER, 2002 by procuring hexane without payment of central excise duty by following the procedure as prescribed under Rule 19(2) of the CER, 2002 and notifications issued thereunder. The said hexane procured without payment of central excise duty was used in the manufacture of DOC and such DOC was exported by respondent no. 1 under claim of duty drawback @ 1% of FOB value as per All Industry Rate of Drawback(Sr. No. 23) prescribed vide Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 superseded by Notification No. 103/2008-Cus(NT) dated 29.08.2008.

2.4 In view of the provisions of Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and condition 7(f) of the Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007(and other similar notifications), it appeared that All Industry Rate of Drawback specified under the Schedule annexed to Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007, as amended, from time to time(and other similar notifications) are not admissible on export of DOC if the same is manufactured in terms of sub-rule (2) of Rule 19 of the CER, 2002 by using excisable material(hexane) in respect of which duties have not been paid.

3.1 On the basis of the details, partywise chart submitted by the respondent no. 1 and the investigation carried out at the end of the manufacturers, the documents of duty free procurement of hexane by availing the benefit under Rule 19(2) of the Central Excise Rules, 2002 resumed from them; viz. hexane procurement and consumption registers, Appendix-46 and invoices of petroleum companies M/s HPCL, M/s BPCL, M/s IOCL etc. and the statements of authorised persons of the merchant exporter, the manufacturer and the legal position mentioned above, it appeared that the respondent no. 1 had wrongly claimed and availed duty drawback amounting to Rs. 97,24,023/- from Kandla Port on the exported goods(DOC) purchased by them from the manufacturers

who had manufactured the same under bond by procuring hexane without payment of duty payable thereon and by availing the benefit under Rule 19(2) of the CER, 2002. It therefore appeared that the respondent no. 1 was not entitled to duty drawback on the exports of such DOC in view of the provisions of Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995(Drawback Rules) and condition 7(f) of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and condition no. 8(f) of Notification No. 103/2008-Cus(NT) dated 29.08.2008 and therefore the said amount of duty drawback paid to them appeared to be recoverable from them under Rule 16 of the Drawback Rules read with Section 75 and Section 28(1) of the Customs Act, 1962. It also appeared that the said respondent no. 1 had wrongly claimed and irregularly availed the said amount of duty drawback by suppression of facts and willful mis-declaration as they had not disclosed the facts of manufacturing the DOC by availing the benefit of Rule 19(2) of the CER, 2002 in the Appendix-III submitted with the shipping bills for claim of drawback. The respondent no. 1 was also liable to pay interest at the applicable rate under Section 28AB of the Customs Act, 1962.

3.2 It appeared that these acts of omission and commission on the part of respondent no. 1, respondent no. 3, respondent no. 2 and respondent no. 4 – Shri V. V. Sunil, Manager Export of respondent no. 3 who looked after all the export related work including the availment of drawback at the relevant period had knowingly and intentionally got filed incorrect declaration in Appendix-III of the shipping bills that DOC had been manufactured without availing the benefit of Rule 19(2) of the CER, 2002 thereby rendering themselves liable to penalty under Section 114 of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962.

3.3 The manufacturer of DOC; respondent no. 3 had in connivance with the respondent no. 1 deliberately not issued ARE-2 for removal of the said DOC and had by abetting/omission rendered the DOC liable for confiscation under Section

114(iii) of the Customs Act, 1962. The respondent no. 1 & respondent no. 3 were called upon to show cause why penalty should not be imposed upon them under Section 114 and Section 114AA of the Customs Act, 1962. The respondent no. 2 & respondent no. 4 had also been asked to show cause why penalty should not be imposed on them under Section 114(iii) & Section 114AA of the Customs Act, 1962 for having abetted the exporter in committing these offences. The respondents were issued SCN on the above grounds.

4. After careful consideration of the evidences adduced by the investigation and relying on various case laws, the Additional Commissioner of Customs, Custom House, Kandla vide OIO No. KDL/DBK/1631/ADC/SS/2013-14 dated 09/16.12.2013 disallowed the drawback claims amounting to Rs. 97,24,023/- and ordered recovery of the amount of duty drawback already sanctioned/released and directed to pay back the amount of duty drawback erroneously availed by them, appropriated the amount of Rs. 20,00,000/- deposited by them vide challan dated 03.12.2009, ordered recovery of interest on the amount of duty drawback erroneously sanctioned, imposed penalty of Rs. 25,00,000/- on respondent no. 1, imposed penalty of Rs. 25,00,000/- on respondent no. 3, imposed penalty of Rs. 10,00,000/- on respondent no. 2 and imposed penalty of Rs. 5,00,000/- on respondent no. 4.

5. Aggrieved by the OIO, the respondents filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) averred that procurement of raw materials under Rule 19(2) of the CER, 2002 would not be a hindrance for claiming 1% drawback being the customs component. He took note of the fact that the dispute related to the period prior to 17.09.2010. However, he discussed the contents of Circular No. 35/2010-Cus dated 17.09.2010 for interpretation of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) & 103/2008. He observed that condition 5/6 of these notifications identifies the customs component when CENVAT facility has been availed. It also clarifies that in a situation where the drawback under the category of CENVAT facility availed

and CENVAT facility not being availed is the same signifies that the drawback pertains only to the customs component. The benefits under Rule 18 and Rule 19(2) would have no effect on drawback of customs component. He observed that the respondent no. 1 had claimed drawback of 1% of FOB value which was the customs component of AIR drawback. He averred that rebate of duty on export goods and drawback of customs component does not amount to double benefit. The Commissioner(Appeals) concluded that Notification No. 84/2010-Cus(NT) dated 17.09.2010 & Circular No. 35/2010-Cus dated 17.09.2010 reinforce the position that drawback of customs would be available even if facility under Rule 18 or Rule 19(2) has been availed. He held that circulars are clarificatory in nature and would apply to notifications issued earlier if the provisions therein are identical and that Notification No. 84/2010-Cus(NT) and Circular No. 35/2010-Cus make explicit what was implicit in earlier notification. In the light of these findings, the Commissioner(Appeals) vide his OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 set aside the OIO with consequential relief to the appellants.

6. The Commissioner of Customs, Kandla found that the OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 was not legal and proper and therefore directed the Assistant Commissioner to file revision application on the following grounds :

(i) AIR Drawback is not available when an exporter avails the facility under Rule 19(2) of the CER, 2002 as per condition 7(f) of Notification No. 81/2006-Cus(NT) and 8(f) of Notification No. 103/2008-Cus(NT).

(ii) Rule 5 of the Drawback Rules provides that revised rate of drawback could be given retrospective effect whereas in the instant case the benefit of AIR drawback has been allowed only w.e.f. 20.09.2010 under Notification No. 84/2010-Cus(NT) as clarified by the Office of the Drawback Commissioner vide letter dated 04.01.2012 and therefore there is no retrospective effect.

(iii) Commissioner(Appeals) has ignored the clarification dated 04.01.2012 issued by Commissioner(Drawback), misinterpreted Board Circular No. 35/2010-Cus and Notification No. 84/2010-Cus(NT) although it clearly mentions that it is effective only w.e.f. 20.09.2010.

(iv) Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)] wherein it was held that where it was evident that inputs had not suffered any duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed.

(v) Reliance was also placed upon the judgment of the Hon'ble Supreme Court in the case of CCE, Chandigarh-I vs. Mahaan Dairies[2004(166)ELT 23(SC)], Hon'ble Delhi High Court in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)]. Reliance was placed upon the decision in the case of Sterling Agro Industries Ltd. Government of India Order No. 214-215/10-Cus dated 06.07.2010 against which the party filed W.P. No. 5894/2011 before the Division Bench of the Gwalior Bench of Hon'ble High Court of Madhya Pradesh and their Lordships held that drawback would be admissible under Rule 3(1) of the Drawback Rules if the benefit from payment of duty or rebate of CENVAT had been reversed, thus upholding the stand that simultaneous availment of drawback and Rule 19(2) cannot be permitted.

(vi) The case laws of Mars International[2012(286)ELT 146(GOI)] and Aarti Industries Ltd.[2012(285)ELT 461(GOI)] relied upon by the Commissioner(Appeals) in the impugned order pertained to the period after 20.09.2010 after issuance of Notification No. 84/2010-Cus(NT) dated 17.09.2010.

(vii) Even the C & AG had pointed out this fraud in PAC Audit Report No. 15/2011-12 in para 2.3.12.

7.1 The respondent no. 1 submitted their reply/cross objection to the revision applications filed by the Department vide their letter dated 31.10.2014(received on 24.11.2014). The respondent firstly contended that since DOC was an exempted product, they were not required to follow ARE-2 procedure. They placed reliance upon CBEC Circular No. 648/39/2002-CX dated 25.07.2002 is this regard. They contended that sales tax documents was sufficient for proof of export. The respondent further submitted that customs portion of drawback can be claimed even if rebate or duty free benefit is availed in respect of excise duty portion. They averred that if the rate indicated is the same in both the columns, it shall mean that the same pertains to only customs component and drawback would be available irrespective of whether the exporter has availed of CENVAT or not. The respondent placed reliance upon CBEC Circular No. 35/2010-Cus dated 17.09.2010 which clarified that drawback of customs portion would be available even if rebate is taken in respect of central excise portion. They placed reliance upon the decisions In Re : Mars International[2012(286)ELT 146(GOI)] & In Re : Aarti Industries Ltd.[2012(285)ELT 461(GOI)]. They contended that these cases were entirely similar and that they held that if rebate is claimed in respect of central excise portion, the drawback of customs portion can also be claimed. The respondent further stated that although hexane had been procured duty free, it did not mean that no duty was suffered on the exported DOC. They averred that merely because no duty was paid on hexane, it could not be alleged that no duty of excise or customs had been suffered. They claimed that in this case, they had also procured duty paid hexane and also used other duty paid goods.

7.2 The respondent no. 1 placed reliance upon CBEC Circular No. 16/2009-Cus dated 25.05.2009 which clarified that merchant exporters purchasing goods from the market for export would be entitled to full rate of drawback including the excise portion to contend that if input rebate or final products rebate is availed then drawback is restricted to customs portion only. The respondent argued that the demand was time barred as it had been issued after expiry of

the period of one year. In this context, they placed reliance upon the decisions in the case of Hanil Era Textiles Ltd. vs. CCE, Belapur[2007(210)ELT 414(Tri-Mum)], TTK Prestige Ltd. vs. CC, Bangalore[2005(188)ELT 385(Tri-Bang)] & Kultar Exports vs. CC, New Delhi[2013(298)ELT 461(Tri-Del)]. With regard to the penalty imposed under Section 114 & Section 114AA of the Customs Act, 1962, the respondent submitted that they have rightly availed the drawback and that there was no wilful suppression on their part. Since there was no intent to wrongly avail drawback, the respondent averred that no penalty was imposable on them under Section 114 & Section 114AA of the Customs Act, 1962. They further submitted that penalty under Section 114 was not imposable as penalty under the said section was imposable only if any person does or omits to do any act which would render the goods liable for confiscation under Section 113. They submitted that in the present case there was no confiscation proposed under Section 113 of the Customs Act, 1962. The respondent further averred that penalty under Section 114AA of the Customs Act, 1962 was imposable only where a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular. They contended that the only provisions applicable were Section 75 & Section 75A of the Customs Act, 1962 and Rule 16 of the Drawback Rules, 1995 under which drawback and interest is to be returned and that no penalty would be imposable.

7.3 The respondent no. 1 pointed out that whereas they and respondent no. 3 had been treated as two separate persons and penalty had been imposed separately on each of them, the show cause notice proposed recovery of drawback jointly from both respondent no. 1 and respondent no. 3 and the order-in-original also demands drawback without indicating specifically which respondent is required to pay back the drawback. The respondent contended that since the order portion of the order-in-original is silent about the person who has wrongly claimed the drawback and at the same time imposes penalty

on both respondent no. 1 and respondent no. 3, it proves that the order-in-original had been passed without application of mind.

8.1 Respondent no. 2, respondent no. 3 and respondent no. 4 filed similar submissions dated 31.10.2014(received on 24.11.2014) and requested that the revision applications be dismissed. Respondent no. 1 was granted personal hearings on 24.09.2018, 11.10.2019 & 07.11.2019. Respondent no. 2 was granted opportunity of personal hearing on 24.09.2018, 15.10.2019 & 08.01.2020. Respondent no. 3 was granted personal hearings on 24.09.2018, 11.10.2019 and 07.11.2019. Similarly respondent no. 4 was granted personal hearings on 04.06.2018, 04.10.2019 & 08.01.2020. However, none of the respondents availed the opportunity of being heard.

8.2 Shri H. U. Patel, Superintendent(DBK), Custom House, Kandla attended the personal hearing on 15.10.2019 & 08.01.2020 on behalf of the Department and submitted letter dated 09.10.2019 of the Assistant Commissioner(DBK), Kandla stating that they had nothing more to add and requested that the case may be decided on merits.

9.1 Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal. Government observes that the short issue in all these revision applications is whether duty drawback @ 1% of FOB value is admissible to the exporter respondent on the exports of DOC under Rule 3(1) of the Drawback Rules read with the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and 103/2008-Cus(NT) dated 29.08.2008.

9.2 It is observed that the detailed investigation has established that respondent no. 3 had procured duty free hexane by availing the facility under Rule 19(2) of the CER, 2002 and used the same for the manufacture of DOC and sold the same to respondent no. 1 during 2006-07, 2007-08. Government takes note that the second proviso to Rule 3 of the Drawback Rules at clause (ii) thereof bars drawback if goods are produced or manufactured using imported materials

or excisable materials or taxable services in respect of which duties or taxes have not been paid. Similarly condition no. 7(f) of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) and condition no. 8(f) of Notification No. 103/2008-Cus(NT) provide that the rates of drawback specified in the schedule shall not be applicable to export of a commodity or product if such product is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. Thus it is apparent that the All Industry Rates of Drawback specified under the schedule annexed to the notifications are not applicable to the exporter of such goods if the goods have been manufactured with inputs on which duty has not been paid and have been procured by availing the facility under Rule 19(2) of the CER, 2002.

10. Government finds that the respondents have not denied the fact of duty free procurement of inputs and their use in the manufacture of DOC by the manufacturers and their export under claim of duty drawback. The inference that can be drawn from the condition in the notifications and Rule 3 of the Drawback Rules that duty should necessarily have been suffered on the inputs used in the export product. This is also the settled legal position. The duty element on the inputs is the primary ingredient for deciding the admissibility of drawback on exports. With regard to the inferences drawn by the Commissioner(Appeals) in the impugned order based on CBEC Circular No. 35/2010-Cus dated 17.09.2010, it is apparent from the text of the circular that the clarification regarding drawback in a situation where the raw materials have been procured without payment of central excise duty under Rule 19(2) of the CER, 2002 has been specifically stated to be admissible only with reference to Notification No. 84/2010-Cus(NT) dated 17.09.2010. It is pertinent to note that the portion where the issue has been raised in clause (d) of para 4(vi) of the circular, the notification mentioned is Notification No. 103/2008-Cus(NT) dated 29.08.2008. However, the notifications determining AIR rate of drawback for the preceding periods do not find mention in the portion where the reference has been answered and only Notification No. 84/2010-Cus(NT) dated 17.09.2010

finds mention. Therefore, it is obvious that the clarification issued by the Board applies only to Notification No. 84/2010-Cus(NT) dated 17.09.2010 which is applicable from 20.09.2010. The issue has been settled beyond doubt by the clarification issued by the Office of the Drawback Commissioner vide his letter F. No. 609/292/2008-DBK dated 04.01.2012 to the Federation of Indian Export Organisation.

11.1 Government takes note of the judgments of the courts on the issue. In the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)], the apex court upheld the principle that when there is evidence that the inputs had not suffered duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed. So also, in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)], their Lordships held that "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty and if goods like agricultural inputs are not imported and do not suffer incidence of excise duty, the question of fixing AIR for such commodities cannot arise. In the case of Suraj Impex (India) Pvt. Ltd. vs. Secretary, Union of India[2017(347)ELT 252(M.P.)], the Hon'ble High Court of Madhya Pradesh held that simultaneous availment of drawback as well as Rule 19(2) was introduced by omission of clause 8(f) of the erstwhile Notification No. 103/2008 and the introduction of new clause 9(b) in Notification No. 84/2010 which was made effective from 20.09.2010 and explained the same in Circular No. 35/2010. Since the Notification No. 84/2010 was effective from 20.09.2010 and the same cannot be given retrospective effect in the light of the aforementioned facts.

11.2 Government observes that in the case of Anandeya Zinc Oxides Pvt. Ltd.[2016(337)ELT 354(Bom.)], the Hon'ble Bombay High Court had occasion to examine the argument put forth by that manufacturer that drawback of customs portion could be availed alongwith facility for procurement of inputs under Rule 19(2) of the CER, 2002. The Hon'ble Bombay High Court found that the view

taken by the authorities below that the petitioners in that case could not avail customs drawback under Notification No. 26/2003-Cus(NT) dated 01.04.2003 could not be faulted. It was further held that there was no scope for bifurcating drawback towards customs and excise allocation. Their Lordships noted that the notification clearly provides an exclusion to the applicability of the entire notification in specific situations which have been specified therein; one of which was - goods manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. They opined that nothing could be read into such notification and that it was well settled that taxation and fiscal statutes have to be strictly construed. Their Lordships firmly held that the Courts cannot read words into such provisos. The judgments of the Apex Court and the High Courts are binding precedents. The case laws which have been relied upon by the respondents do not consider these judgments and in some cases pertain to the period after 20.09.2010. Therefore, Government concludes that AIR drawback is not admissible to the respondent no. 1 and the drawback sanctioned and paid to the said respondent is liable to be recovered alongwith interest.

12.1 The respondents have argued regarding the fact that the SCN is hit by limitation in view of it having been issued beyond one year of the offence. Government observes that the SCN has been issued after the DGCEI carried out a laborious investigation which unraveled the willful mis-statement and suppression of facts on their part to falsely obtain drawback which was not due to them. The fact that there were several other merchant exporters and manufacturers who had indulged in a similar method of not issuing ARE-2 and misdeclaring in the Appendix-III that the goods have been manufactured without following the procedure under Rule 19(2) of the CER, 2002 also pointed to machination on a larger scale and dispels their assertions about having acted bonafidely. In such cases, the Department is empowered to issue SCN within the extended period of five years in terms of proviso to Section 28(1) of the Customs Act, 1962 read with Rule 16 of the Customs, Central Excise Duties and Service

Tax Drawback Rules, 1995 read with Section 75 of the Customs Act, 1962 and hence the SCN's are not hit by limitation.

12.2 The respondent has averred that in case of export of exempted products, the procedure of ARE-2 is not required and in case of export through merchant exporter the sales tax form i.e. Form H issued by the merchant exporter can be accepted as proof of export. Reliance was placed upon Board Circular No. 648/39/2002-CX dated 25.07.2002 in this regard. Government on going through the circular observes that the clarification in the circular dated 25.07.2002 has been issued on representations received from small scale manufacturers requesting to accept Sales Tax documents as proof of export for supplies made to other domestic manufacturers who use the said goods in manufacture/packing of goods for export. In the present case, the manufacturer M/s Laxmi Solvex is a large scale unit and therefore the clarification does not apply to them. Moreover, it would be pertinent to note that the Form ARE-2 envisages a situation where the exports are not dutiable or where goods are being cleared under bond/letter of undertaking in terms of Rule 19 to take care of situations like the one in the present case. Therefore, the reliance on Circular No. 648/39/2002-CX dated 25.07.2002 is fallacious and cannot be given any credence. The respondent has also relied upon a case law to contend that the Sales Tax documents are to be accepted as proof of export in the present case. The respondent has digressed from the original issue of wrongly availing drawback on the export goods. In the instant case, the Department has not challenged the factum of export at any point and therefore this submission holds no merit.

12.3 The respondent has made some arguments to the effect that since they have used other duty paid goods for the manufacture of the export goods, they would be eligible for drawback. In this regard, Government finds that the categorical stipulation of the respective notifications allowing drawback is that the rates of drawback shall not be applicable to the export of a commodity or

product if it is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. It does not leave any scope for interpretation of the degrees/percentages in which materials could be used in the manufacture. Once any material procured under sub-rule (2) of Rule 19 of the CER, 2002 is used for manufacture, the manufacturer is disentitled from the benefit of drawback. There is no room left for interpretation and hence the arguments put forth by the respondent must fail. Likewise the inferences drawn by the respondent on the basis of Circular No. 16/2009-Cus dated 25.05.2009 are misplaced as that clarification has been issued exclusively for the benefit of merchant exporters purchasing goods from the market. The present case does not involve circumstances where the respondent has purchased materials from the market. Stretching the circular to justify the use of materials procured under Rule 19(2) of the CER, 2002 is beyond the pale.

13.1 Government proceeds to consider the case for imposition of penalty on the exporter and the manufacturers who have supplied DOC to the exporter. The respondent no. 3 has not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing the goods. The fact that further weakens the defence about their bonafides and their claim that non-issue of ARE-2 was merely due to oversight is the fact that the DGCEI has booked cases against several manufacturers and exporters who had adopted the same practice of not issuing ARE-2's. There are a total of 18 manufacturers/exporters involved in the proceedings under the impugned order. Besides these manufacturers/exporters there are other cases booked by the DGCEI which involve identical facts and involve several other manufacturers/exporters. Such synchronized failure in not issuing the ARE-2's cannot be passed off as a coincidence. It is therefore apparent that the procedure adopted by the manufacturers was ideal for the exporter to claim ignorance of the fact that inputs had been procured by availing the facility of Rule 19(2) of the CER, 2002 and claim drawback. The fact that this practice was adopted by several manufacturers/exporters across Commissionerates is a pointer to the adoption of this modus to enable exporters

to claim drawback where the manufacturers had availed the facility under Rule 19(2) of the CER, 2002 to procure inputs. Government is therefore of the view that the respondent no. 1 as well as the manufacturer respondent no. 3 have rendered themselves liable to be penalized. In Re : Rama Phosphate Ltd.[2014(313)ELT 838(GOI)], the Government had arrived at the conclusion that the manufacturer could not be penalized as there was no documentary evidence. The Government finds that the very fact that all the manufacturers involved in these cases had not issued ARE-2 and the practice has been commonly adopted by all of them evidences the fact that there was some sort of an arrangement between the manufacturers and the exporters to enable the exporter to avail drawback. Government therefore holds that both the manufacturer and the exporter are liable to be penalized.

13.2 The respondent has contended that the show cause notice proposed to jointly recover the drawback from M/s Laxmi Ventures (I) Ltd. and M/s Laxmi Solvex Ltd. and the OIO also confirms recovery of drawback without specifying from whom the same is recoverable whereas the OIO simultaneously treats the two as separate persons and penalty is imposed separately on each. In this regard, Government observes that although M/s Laxmi Ventures (I) Ltd. and M/s Laxmi Solvex Ltd. are related to each other in as much as M/s Laxmi Solvex Ltd. is a Division of M/s Laxmi Ventures (I) Ltd., they still remain separate juristic persons in the eyes of the law. They are vested with duties and responsibilities in their entities as separate limited companies. Since the drawback has been claimed and sanctioned to M/s Laxmi Ventures (I) Ltd., it would follow that they would be liable to pay it back to the Department. However, penal action proposed against M/s Laxmi Ventures (I) Ltd. and M/s Laxmi Solvex Ltd. would operate in separate spheres. The penal action initiated against the two would be commensurate with their actions in claiming drawback which was not admissible to M/s Laxmi Ventures (I) Ltd. M/s Laxmi Ventures (I) Ltd. had actually claimed the drawback which was inadmissible while M/s Laxmi Solvex

Ltd. had abetted them. Hence, both M/s Laxmi Ventures (I) Ltd. and M/s Laxmi Solvex Ltd. were liable to be penalised separately.

13.3 The respondents have made submissions contending that the statutory provisions under which penalties have been proposed are not applicable. In this case, the tone and tenor of the actions of the exporter and the manufacturer reveals that it was a well thought out ruse to avail drawback. There were several manufacturers and exporters against whom cases were booked by the DGCEI involving identical modus. In all these cases raw materials had been procured without payment of duty under Rule 19(2) of the CER, 2002, ARE-2 had not been issued and thereafter drawback was claimed. The respondents have all made a false declaration in the Appendix-III stating that goods had not been manufactured by availing the procedure under Rule 18/Rule 19 of the CER, 2002. It is implausible to even visualize that there were errors or mistakes by oversight in all these declarations. The respondent has pleaded that Section 114 was invokable only in cases where the goods are liable to confiscation. As such the respondents had rendered the goods liable for confiscation by misdeclaring that they had not availed the facility under Rule 19 of the CER, 2002 and by availing drawback on the exports. However, since the goods had been exported, the show cause notice does not propose confiscation. The fact that there is no proposal to confiscate the goods or that the goods were not available for confiscation would not prevent penalty from being imposed on them. In this regard, Government places reliance upon the judgment in the case of Dadha Pharma Pvt. Ltd. vs. Secretary to the Government of India[2000(126)ELT 535(Mad)] which has interpreted the words "liable to confiscation" occurring in Section 112 of the Customs Act, 1962 and concluded that the power to adjudicate upon for imposition of penalty springs from the liability to confiscate and not from actual confiscation. The same analogy would apply to the provisions of Section 114 of the Customs Act, 1962. That is to say, if the goods were liable to confiscation by virtue of any action/inaction on the part of the exporter the goods, the exporter would be liable to be penalized. Even if the goods

are not available for confiscation, the penal provisions would still be invokable. There were very well thought out motives behind the actions of the respondents. There was common intention behind the false/incorrect declarations to avail drawback which would otherwise not be available. Hence, penalty under Section 114 and Section 114AA were correctly imposable on the respondents.

13.4 In so far as imposition of penalty on respondent no. 2 and imposition of penalty on respondent no. 4 is concerned, Government observes that respondent no. 2 was the Director of both respondent no. 1 and respondent no. 3. Being the Director of both companies he would be in a position of authority to take decisions. His statement has been recorded during the investigation and he has admitted after going through the Appendix-III declarations of shipping bills that they have declared that the export goods have not been manufactured by availing the benefit of Rule 19(2) of the CER, 2002 which was contrary to the factual position. Respondent no. 2 has tried to deflect the blame on to the CHA by stating that the Appendix-III declarations were submitted by the CHA at the port. However, respondent no. 4 – Shri V. V. Sunil, Manager of M/s Laxmi Solvex Ltd. has fairly admitted in his statement recorded by the DGCEI stated that Shri Akash Agrawal was directing the export and availment of duty drawback and that the Appendix-III declarations were signed as per his directions. Government finds that the fact that the Director of the companies was directly involved in the move to avail drawback makes the actions of Shri V. V. Sunil, Manager of M/s Laxmi Solvex Ltd. a mere formality. Shri V. V. Sunil was an ordinary employee who did not have the authority to take decisions or have the choice to do things differently. Respondent no. 4 was merely taking instructions and discharging his duties as an employee. Government finds that penalty imposed on Shri Akash Agrawal is sufficient and meets the ends of justice. The proposal to penalise Shri V. V. Sunil, Manager of M/s Laxmi Solvex Ltd. being excessive must be discarded.

14. Government therefore sets aside the impugned OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 and restores the OIO No. KDL/DBK/1631/ADC/SS/2013-14 dated 09/16.12.2013 passed by the Additional Commissioner of Customs, Custom House, Kandla. However, the penalty imposed on Shri V. V. Sunil, Manager of M/s Laxmi Solvex Ltd. is set aside. The revision applications filed by the Department are allowed.

15. So ordered.

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

ORDER No. 162-165 /2020-CX (WZ) /ASRA/Mumbai DATED 01.09.2020

To,

1. M/s Laxmi Ventures (I) Ltd.
   36/40, Mahalaxmi Bridge Arcade,
   Mahalaxmi, Mumbai
2. Shri Akash Agrawal
   Director of M/s Laxmi Ventures (I) Ltd.,
   36/40, Mahalaxmi Bridge Arcade,
   Mahalaxmi, Mumbai
3. M/s Laxmi Solvex Ltd.
   (A Division of M/s Laxmi Ventures (I) Ltd.)
   Durgapura, Dewas, Indore
4. Shri V. V. Sunil, Manager
   M/s Laxmi Solvex Ltd.(A Division of M/s Laxmi Ventures (I) Ltd.)
   Durgapura, Dewas, Indore

Copy to:

1. The Commissioner of Customs, Custom House, Kandla
2. The Commissioner of Customs(Appeals), Kandla
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy