REGISTERED SPEED POST

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. 380/27/DBK/13-RA/4187 Date of Issue :- ~~.07.2021~~ 12.08.2021

ORDER NO. 174 /2021-CUS(WZ)/ASRA/MUMBAI DATED 28 .07.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicants : The Commissioner of Central Excise, Pune –III.

Respondents : M/s DSM India Pvt. Ltd.
401/402, 4th floor, NSG IT Park,
Aundh, Pune – 411 007.

Subject : Revision applications filed under Section 129DD of the Customs Act, 1962, against the Order in Appeal No. PIII/RP/283/2012 dated 11.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

ORDER

This Revision application is filed by the Commissioner of Central Excise, Pune –III Commissionerate (hereinafter referred to as the 'the department') against the Orders-In-Appeal No. PIII/RP/283/2012 dated 11.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

2. The brief facts of the case are M/s DSM India Pvt. Ltd. 401/402, 4th floor, NSG IT Park, Aundh, Pune – 411 007 (hereinafter referred to as 'the respondent') had submitted applications for fixation of Brand Rate of Drawback under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 for the amount of Rs. 3,17,749/- (Rupees Three Lakh Seventeen Thousand Seven Hundred Forty Nine Only). The impugned Brand Rate Fixation applications were rejected by the department vide Order / Letter bearing F. No. 167/ PNE/P.III/BRU/15/11=12 dated 01.05.2012 on the grounds mentioned below :-

2.1 The respondent have availed the drawback under Rule 3 of Drawback Rules declaring the sub serial number of the All Industry Rate of Drawback.

2.2 As per EDI system, AIR of drawback amount is sanctioned and credited directly to the exporter's bank account. There were 12 shipping bills in the impugned claim.

2.3 Subsequently applications were filed by the respondent on 10.11.2012 to claim Special Brand Rate of Drawback under Rule 7. The act of exporter was a post operative thought after their claim already got sanctioned under Rule 3 of the said DBK Rules from Customs Authority.

2.4 To export the goods by declaring the intention to avail AIR under Rule 3 and later on to claim Brand Rate under Rule 7 will amount to revision in the shipping bill subsequent to export and without authority of law.

2.5 The respondent declared in the shipping bills of applications, only to avail AIR of drawback by mentioning relevant S.S. No. of the drawback schedule.

2.6 Rule 7 is an exception to the mandatory Rule 3 of DBK Rules. Adequate safeguards have been built in the Rule 7 to process the applications received under Rule 7. Before export, the exporter should make up his mind and opt for drawback under Rule 7. This has been further clarified by CBEC vide letter dated 30.12.2011.

2.7 Applicant had not stated any reason as to why the intention to avail Special Brand Rate of Drawback under Rule 7 for the exports made have not been declared at the time of export.

3. Being aggrieved by the said order, the applicant filed an appeal before Commissioner (Appeals-III), Central Excise, Pune. The appellate authority vide impugned Order in Appeal see aside the decisions of rejection of brand applications and directed the department to fix brand rate under Rule 7 of the Drawback Rules, 1995. The appellate authority while passing impugned Order in Appeal observed that :-

3.1 The rejection of the drawback application by the DC(BRU) is clearly against the basic intention of Section 75 of Customs Act of granting refund of duties and taxes to exporters after the fulfilment of given conditions therein.

3.2 Government of India through its various policy documents on exports has made it clear that only goods and services need to be exported and not the duty and taxes.

3.3 All Industry Duty Drawback rates are notified by the Central Govt. in respect of specified goods annually under Rule 3 and Special Brand Rate of Drawback under Rule 7 has been provided subject to fulfilment of conditions there under to grant differential drawback over and above the once granted under Rule 3.

3.3 Under Rule 15 of Drawback Rules, it is stated that where the exporter find that the amount of drawback paid to him is less than the what he is entitled to on the basis of the amount or rate determined by the Commissioner of Central Excise, he may refer supplementary claim in the form of Annexure – III within a given period.

3.4 There is no provision that application under Rule 7 of Drawback Rules cannot be entertained when AIR is availed for export products at the time of export.

3.5 Declaration filed at the time of filing shipping bill under All Industry Drawback under Rule 3 does not restrict right of claiming Special Brand Rate of drawback as allowed under Rule 7 in respect of such shipment in any manner.

3.6 The clarification sought by the Deputy Commissioner vide CBEC letter F. No. 606/04/2011-DBK dated 30.12.2011 is an internal communication of Central Government and no issued as per the public interest under any circular or notification.

3.7 Rejection of Special Brand Rate of Drawback is on account of procedural reasons only and therefore is in contradiction of the basic provisions of Customs Act viz. Section 75 related to grant of duty drawback on exports.

4. Aggrieved by the said order, the department filed instant Revision Application on following grounds :-

4.1 As per the law and procedure, the exporter at the time of filing shipping bill has to specifically indicate the sub serial / tariff item no. of the drawback schedule under which he intends to claim drawback in respect of goods exported. However, in case he intends to file application for fixation of Special Brand Rate of drawback under Rule 7, he is required to indicate sub serial no. 9801 in the shipping bill. The respondent, however, in this case had not indicated their intention to file applications for fixation of special brand rate of drawback at the time of export by indicating the tariff item no. 9801.

4.2 Rule 7 is meant for exceptional cases where AIR prescribed is substantially lower than the input duty on the imported goods. Rule 7 is exception to the mandatory rule of Rule 3 of Drawback Rules.

4.3 The issue had been clarified by the CBEC vide letter F. No. 606/04/3022-DBK dated 30.12.2011. The clarifications issued by the Board in the letter make it evident that the provisions of Drawback Rules do not provide that an exporter can avail AIR Drawback first at the time of export under specified sub serial no. of the AIR schedule and then file for determination of the Brand Rate under Rule 7.

4.4 The Customs Manual indicates the procedure for claiming duty drawback states that the Brand Rate of duty drawback is to be claimed by the exporter at the time of export and the requisite particulars have to be filled in the relevant part of the shipping bills.

4.5 The respondents were well aware of the procedures and rules to be filed by them keeping the Public Notices issued by Customs Houses in this subject. Hence, they were bound to follow the instructions given in Public Notice for flowing the EDI procedure.

4.6 It is important to take note of the explicit provisions made in Sub Section 1 of Section 75 of Customs Act, 1962 stating that duty drawback shall be allowed in respect of export goods in accordance with and subject to the duty drawback rules made under Sub section 2 of Section 75 of Customs Act.

5. The respondents had filed response to the SCN and Revision Application filed by the applicant vide their letter dated 05.02.2016. The respondents submitted that :-

5.1 The rejection of the drawback application by the department was against the basic intention of Section 75 of the Customs Act, 1962.

5.2 The interpretation arrived by the department was not tenable in law as there is no specific provision that application under Rule 7 of Drawback Rules

cannot be entertained when AIR is availed for export products at the time of export.

5.3 Declaration filed at the time of filing shipping bill under All Industry Drawback under Rule 3 in no matter restrict exporters right of claiming brand rate of drawback.

5.4 The applications rejected by the department was against the provisions of Rule 15 of the Drawback Rules.

5.5 The Customs Circular No. 10/2003 dated 17.02.2003 has been issued prior to the decentralisation of work related to fixation of brand rate of drawbacks and is not applicable to the shipments covered under the subject applications.

5.6 The applications rejected by the department and Revision Application filed are against the provisions of Circular No. 14/2003 dated 06.03.2003 and formats fixed there under.

5.7 The High Court of Mumbai has held in several cases on the subject of 'rejection of Duty Drawback under Supplementary claim when AIR drawback under Rule 3 is availed at the time of shipment' as not as per the Duty Drawback Rules and related acts /rules and has further held that drawback should be granted to such shipments by the BRU under Rule 7 of the Drawback Rules. The respondents relied upon the judgement given by the Bombay High Court in the case of Alfa Laval (india) Ltd. [2014(309) ELT 17 (Bom.)].

6. A Personal Hearing in the matter was held on 05.11.2019, 11.01.2021, 18.01.2021, 25.01.2021 12.02.2021and 18.03.2021. No one appeared for the personal hearings so fixed by this office. Since sufficient opportunities of personal hearings have been offered in the instant case, the case is taken up for decision based on the documents available on record.

7. Government has carefully gone through the relevant case records available in case file, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

8. The Government finds that the issue needs to be decided in the instant revision application is whether the applicant, who, at the time of export of the goods, have claimed and been granted drawback at AIR under Rule 3 of Drawback Rules are barred from making an application for determination of the brand rate of drawback under Rule 7, when the amount or rate of drawback determined under Rule 3, or revised under Rule 4, is less than 4/5th (80%) of the duties or taxes paid on the inputs / input services used in the production or manufacture of the exported goods.

9. Government finds that the applicant had claimed All Industry Rate (AIR) of Drawback as determined under Rule 3 of the Drawback Rules,1995 on goods exported by them. Subsequently, the applicant filed application for fixation of Brand Rate of Drawback under Rule 7 of the Drawback Rules After availment of the said Drawback. Thus it is observed that initially the applicant exported the goods and claimed All Industry Rate of drawback. Subsequently, the applicant wanted to change the same into a claim of fixation of Brand Rate. The lower authorities have objected to it stating that applicants had opted for drawback under AIR in the Shipping Bills which would disentitle them from claiming brand rate of drawback under Rule 7.

10. The Government observes that the department has contested the order in appeal mainly based upon the clarification issued by the Board vide its letter F. No. 606/04/2011-DBK, dated 30-12-2011. , the C.B.E. & C. It is found that the appellate authority has discussed this issue at length in para 15 of the impugned order which read as under :-

"15.....

Thus it is clearly emerges that on receipt of Board's said letter 30.12.2011, the practice of fixation of Special Brand Rate has undergone a change in the Brand Rate Unit of Pune-III Commissionerate even though there has been no change in legal provisions governing Drawback in the Customs Act or DBK Rules. Further neither the Board's letter dated 30.12.2011 is in Public domain nor any circular has been issued by the Board since 30.12.2011 making it mandatory to mention Tariff Item 98.01 in the Shipping Bills when the exporter intends to claim Drawback under Rule 7 of DBK Rules after claiming and getting Drawback amount at All Industry Rate under Rule 3 immediately after export of goods. It is also noticed that the said letter dated 30.12.2011 issued by the Board is only a reply given on certain doubts raised by Pune –I Central Excise Commissionerate. It is also noticed that no Public Notice has ben issued by Pune–III Commissionerate informing exporters about change of practice of fixation of Brand Rate under Rule 7. "

11. The Government finds that the C.B.E. & C. in its Circular No. 10/2003-Cus., dated 17-2-2003 clarified that henceforth in all those cases where the exporters have applied for brand rate of drawback, they may be permitted the duty drawback at All Industry Rate as admissible under the relevant Sr. No. of duty drawback table and subsequently when exporters are issued brand rate of drawback, the differential amount may be sanctioned to them.

12. Government observes that in a situation as above, it pertinent to consider and proceed in the matter in the light of Hon'ble High Court's observations in the case of *M/s. Alpha Laval (India) Ltd. Vs. UOI* - 2014 (309) E.L.T. 17 (BOM.). The relevant paras of the judgment are as under:-

""**23.** *On a careful and conjoint reading of the aforesaid Rules, we do not find that there is any prohibition set out in the Drawback Rules which debars an exporter from seeking determination of the Brand Rate of drawback under Rule 7, merely because at the time of export, he had already claimed the All Industry Rate of drawback under Rule 3. In fact, to our mind, the Rules seem to suggest otherwise. Firstly, Rule 3 which deals*

with "drawback", itself stipulates when drawback is not to be allowed [see second proviso to Rule 3(1)]. Despite specifying certain situations when, drawback is not be allowed, we do not find any provision specified therein barring an exporter from seeking a determination of the Brand Rate of drawback under Rule 7, merely because, at the time of export, he applied for the grant of the All Industry Rate of drawback under Rule 3. Secondly, Rule 7 categorically provides that where in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of said goods, he may make an application within sixty days for determination of the amount or rate of drawback thereof under Rule 7, disclosing all the relevant facts and subject to the other conditions stipulated under Rule 7. The word "finds" appearing in Rule 7 after the words "manufacturer or exporter", ex facie indicates that it is only once the manufacturer or exporter comes to the conclusion that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the exported goods, can he make an application for determining the Brand Rate of drawback under Rule 7. There could certainly be instances where the manufacturer or exporter would not, at the time of export, be able to determine and/or come to the conclusion that the rate of drawback determined under Rule 3 for the specified exported goods, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the said exported goods. To cover this difference, Rule 7(1) allows the manufacturer or exporter to make an application in this regard and claim the difference, provided the rate of drawback determined under Rule 3, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services, used in the production or manufacture of the said exported goods. In other words, if the rate of drawback as determined under Rule 3 is more than 4/5th (80%) of the duties or taxes paid on the inputs/input services used, then the application made under Rule 7(1) would have to be rejected.

24. *In arriving at the above conclusion, we also get assistance by what is stated in Rule 7(3). Sub-rule (3) of Rule 7 inter alia provides that where a person applies for determination of the Brand Rate of Duty Drawback under Rule 7(1), then pending the application, he may provisionally apply for being granted duty drawback as determined under Rule 3 subject to executing a bond as stipulated therein. This position is even accepted by Mr. Jetly. If we were to accept the submission of the Revenue, that once an exporter or a manufacturer was to apply for drawback at the All Industry Rate under Rule 3, he would be debarred from seeking determination of the Brand Rate of drawback under Rule 7, then no exporter at the first instance, would ever apply for drawback at the All Industry Rate determined under Rule 3, and would always apply under Rule 7(1) for seeking determination of the Brand Rate of drawback, along with an application under Rule 7(3) for the grant of provisional duty drawback at the All Industry Rate as determined under Rule 3. This could not have been the intention of the Legislature or the Central government at the time of bringing into force the Drawback Rules. There is nothing else that has been brought to our notice, either in the Customs Act, 1962 or the Drawback Rules, that could even impliedly spell out the prohibition, as sought to be contended by Mr. Jetly. We therefore hold that the manufacturer or exporter is not barred from seeking a determination of the Brand Rate of drawback under Rule 7 merely because, at the time of export, he had applied for and granted drawback at the All Industry Rate as determined under Rule 3. Our view also finds support in the language of the First proviso to Rule 3(1) and far from any prohibition in applying for Drawback in terms of Rule 7. Rule 7 comes*

into play only in cases where the amount or rate of drawback is low and not otherwise. The apprehension of Mr. Jetly is taken care of by the clear language of Rule 7(1) and the use of the words "determined under Rule 3" or "revised under Rule 4". It is also taken care of by the wordings of sub-rule 3 of Rule 7.

25. *Having held so, we now turn our attention to the Circular dated 30th December, 2011 issued by the C.B.E. & C. The relevant portion of said Circular reads as under :-*

> *"2. On examining the matter it is noted that :*
>
> *(a) As per Rule 7 of the Drawback Rules, 1995, if the exporter finds that the amount or rate of Drawback determined under notified AIR drawback under Rule 3 or 4 is less than four fifth of the duties and taxes suffered on inputs/input services used in manufacture of export goods, he may within specified period apply before the jurisdictional Central Excise Commissioner for determination of amount or rate of drawback (Brand Rate). Here, it must be kept in mind that the AIR drawback determined under Rule 3 or 4 of the Drawback Rules is specified in the Drawback Schedule by notification. The exporter can compare this with the facts of his case and decide if it is less than four fifth of the duties and taxes suffered and also whether he wants to apply for fixation of Brand Rate in his case.*
>
> *(b) If the exporter chooses to opt for Brand Rate, then the exporter makes declaration in the Shipping Bill mentioning drawback sub serial/Tariff Item Number as 9801. Then, within the specified time from let expert date, the exporter applies for Brand Rate of drawback before the jurisdictional Central Excise authority. During the pendency of this application, the exporter may be allowed the facilitation under the Board's Circular No. 10/2003 subject to necessary conditions.*
>
> *(c) After the jurisdictional Central Excise authority fixes/sanctions Brand Rate, the matter goes back to the customs at the port of export for making the requisite payment, with reference to the exporter's declaration of having opted for Brand Rate by specifying the drawback Tariff Item No. as 9801 in the Shipping Bill at the time of export. It is this option that enables the Shipping Bill to be brought back into drawback queue for payment of Brand Rate.*
>
> *(d) Thus, provisions do not provide that an exporter can avail the AIR Drawback first at the time of export under specified sub serial/Tariff Item number of the AIR schedule and then file for determination of the Brand Rate under Rule 7. Exporter's declaration of Tariff Item number other than 9801 on the Shipping bill is declaration that he is satisfied with the AIR rate and opts for it. Any other interpretation would also undermine the entire EDI procedure in this respect."*

26. *On reading the Circular, and particularly Paragraph (d) thereof, it is clear that the Circular seeks to interpret the Rules to mean that an exporter once having availed the All Industry Rate of drawback at the time of export, cannot file an application for determination of the Brand Rate of drawback under Rule 7. As discussed earlier, on a plain reading of the Drawback, Rules, we do not find any such prohibition as is sought to be culled out by the C.B.E. & C. in its Circular dated 30th December, 2011. The C.B.E. & C. whilst clarifying the said Drawback Rules, has imposed limitations/restrictions which are clearly not provided for in the Rules, and has the effect of whittling down the Drawback Rules. Under the grab of clarifying the Rules, the C.B.E. & C. cannot incorporate a restriction/limitation, which does not find place in the Drawback Rules. In Clause (d) of the Circular cannot be reconciled with Clauses (b) and (c) thereof. Hence, read together and harmoniously it will have to be held that the Circular cannot override the Rules and particularly Rules 3 and 7 of the Drawback Rules and the sub-rules thereunder. This being*

the case, Clause (d) of the said Circular is clearly unsustainable and has to be struck down. On the same parity of reasoning, and more so because the orders/letters impugned herein, rely upon the said Circular to reject the applications of the Petitioner seeking determination of the Brand Rate of drawback under Rule 7, even the said impugned orders/letters will have to be set aside.

27. *In view of our discussion in this judgment, Clause (d) of the said Circular dated 30th December, 2011 issued by the C.B.E. & C. as well as the impugned orders dated 27th September, 2012 issued by Respondent No. 3, and the orders/letters dated 19th April, 2012, 11th June, 2012 and 24th July, 2012 issued by Respondent No. 5, cannot be sustained. The rule is, therefore, made absolute and the Petition is granted in terms of prayer Clauses (a) and (b). The Respondents are therefore directed to forthwith accept the applications of the Petitioner as set out in Paragraph 10 of the Petition and process the same as per the provisions of Rule 7 of the Drawback Rules. It is needless to add that if the authorities find that the applications made under Rule 7 do not comply with the provisions of the Rules, the authorities are free to reject the same in accordance with law. The Writ Petition is accordingly disposed off. There shall be no order as to costs."*

The Government finds that the issue involved in the instant case is similar to the case cited above, the ratio of the above referred order of Hon'ble Bombay High Court is squarely applicable to the instant case.

13. In view of above position, Government holds that the Appellate Authority has rightly directed the department to fix brand rates under Rule 7 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 in respect of fourteen applications covered by the rejections letters.

14. Government, therefore, does not find any reason to modify Orders in Appeal No. PIII/RP/283/2012 dated 11.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune and therefore refrains from exercising its revisionary powers in these Revision Applications.

15. The revision application is disposed off in the above terms.

Shrawan 28/07/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

F. No. 380/27/DBK/13-RA

To,

The Commissioner of CGST,
Pune – II Commissionerate,
41-A,"GST Bhavan", Sasoon Road Pune,
Opposite Ness Wadia College,
Pune - 411 001.

Copy to :

1. M/s DSM India Pvt. Ltd. 401/402, 4th floor, NSG IT Park, Aundh, Pune – 411 007.
2. The Commissioner of CGST, Pune Appeals-II, GST Bhavan, F Wing, 2nd floor, 41-A, Sassoon Road, P.B. No. 121, Pune - 411 001.
3. Guard File.
4. Spare copy.