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. 371/29/DBK/2013-RA 14239
371/64/DBK/2013-RA
380/37/DBK/2013-RA

Date of Issue: 12.08.2021

ORDER NO.176-178/2021-CUS (WZ) /ASRA/MUMBAI DATED 30.07.21 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.

Subject : Revision Applications filed, under Section 129DD of the Customs Act, 1962 against Orders in Appeal passed by Commissioner (Appeals-III), Central Excise, Pune.

Sl. No.	Revision Application No/ Order in Appeal (OIA) No.	Applicant	Respondent
1.	371/29/DBK/13-RA filed against OIA No. PIII/RP/03&04/ 2013 DATED 07.01.2013	M/s Gartech Equipment Pvt. Ltd., Pune	Commissioner of Central Excise, Pune-III
2.	380/37/DBK/13-RA filed against OIA No. PIII/RP/03&04/ 2013 DATED 07.01.2013	Commissioner of Central Excise, Pune-III	M/s Gartech Equipment Pvt. Ltd., Pune
3.	371/64/DBK/13-RA filed against OIA No. PUN-EXCUS-003-APP-154-12-13 DATED 11.06.2013	M/s Gartech Equipment Pvt. Ltd., Pune	Commissioner of Central Excise, Pune-III

ORDER

M/s Gartech Equipment Pvt. Ltd. Pune have filed Revision Applications No.371/29/DBK/13-RA and 371/64/DBK/13-RA against OIA No. PIII/RP/03&04/ 2013 dated 07.01.2013 and OIA No.PUN-EXCUS-003-APP-154-12-13 dated 11.06.2013 passed by the Commissioner (Appeals-III), Central Excise, Pune.

Against same Order in Appeal, viz. PIII/RP/03&04/ 2013 dated 07.01.2013, Commissioner, Central Excise, Pune-III has also filed Revision Application No. 380/37/DBK/2013-RA

Revision Application No. 371/29/DBK/13-RA

2. The case in brief is that the M/s Gartech Equipment Pvt. Ltd. Pune had filed appeals before Commissioner of Central Excise (Appeals-III) Pune against the rejection of Brand Rate applications by Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (Drawback Rules) vide

(i) Letter F.No.143/MBI/P-III/BRU/125/11-12 dated 08.05.2012 (Appeal No. 210/2012) &

(ii) Letter F.No.228/MBI/P-III/BRU/204/11-12 dated 23.05.2012 (Appeal No.228/2012).

3.1 Commissioner (Appeals) vide Order in Appeal No. PIII/RP/03&04/ 2013 Dated 07.01.2013 set aside the Order/Letter of Additional Commissioner dated 08.05.2012 (Appeal No. 210/2012) and directed him to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 in respect of the corresponding applications dated 22.10.2011, 30.11.2011, 09.01.2012 filed by M/s Gartech Equipment Pvt. Ltd.

3.2 In the same Order Commissioner (Appeals) passed Order in respect of Order/Letter of Additional Commissioner dated 23.05.2012 (Appeal No. 228/2012) by modifying the Order/Letter dated 23.05.2012 and directed Additional Commissioner to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 in respect of the following four Shipping Bills:-

a) No.6570390 dated 7.12.2011, b) No.65955505 dated 9.12.2011
c) No.6796295 dated 22.12.2011 d) No. 6796298 dated 22.12.2011

3.3 However, Commissioner (Appeals) did not pass any Order in respect of the following four Shipping Bills:-

a) No.6941259 dated 2.01.2012, b) No.6951600 dated 3.01.2012
c) No.7074266 dated 11.01.2012 d) No.7346121 dated 31.01.2012

4. M/s Gartech Equipment Pvt. Ltd.'s request for fixing of special brand rate under Rule 7 of the Drawback Rules, 1995 in respect of aforesaid four Shipping Bills was also rejected by the Additional Commissioner(BRU) Pune-III vide same Order/Letter dated 23.05.2012 (which also formed part of Appeal No.228/2012). However, Commissioner (Appeals) did not pass any Order either confirming or modifying or annulling the decision to reject the applications for fixation of Special Brand rate under Rule 7 ibid, by the Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate in respect of 4 shipping bills (at para 3.3 above) in Order in Appeal No. PIII/RP/03&04/ 2013 dated 07.01.2013.

5. Being aggrieved by the above Order-in-Appeal to the extent that it did not pass any Order/direction in respect of 4 shipping bills (Para 3.3 supra) M/s Gartech Equipment Pvt. Ltd. has filed this Revision Application mainly on the following grounds;

a) All the eight Shipping Bills (collectively mentioned at para 3.2 & 3.3 supra) have same facts and circumstances and exports have taken place during the financial year 2011-12 when Tariff item 98.01 was not included in the Drawback Schedule. Thus disallowing fixation of Special Brand rates in respect of these 4 Shipping Bills dated 2.01.2012, 3.01.2012, 11.01.2012 and 31.01.2012 merely because of a letter letter F.No. 606/04/2011-DBK dated 30.12.2011 which has been held by Commissioner(Appeals) himself as not being Board's Circular and which contained a stipulation that S.S. No./Tariff Item No. 98.01 may be mentioned on the shipping Bills for claiming Special Brand rate is not legal or proper order.

b) The legal position is that the letter dated 30.12.2011 is not in the nature of Circular issued by the Board nor it is put in public domain by the Board to be followed by exporters and is only a reply given on certain doubts raised by Pune-I Central Excise Commissionerate; that the said letter is inconsequential and it is of no relevance as far as fixation of Special Brand Rate under Rule 7 of the Drawback Rules is concerned. The order is thus illegal and not enforceable.

c) Commissioner (Appeals) has not passed any speaking order either confirming or modifying or annulling the decision or order appealed against in so far as the 4 shipping bills relating to the period January. 2012 are concerned.

There has been no specific order regarding these 4 shipping bills. Hence, one cannot be compelled to draw a conclusion that since out of 8 shipping bills forming part of Appeal No.228/2012 out of which the Order in Appeal contains a direction to Additional Commissioner, (BRU), Pune-III to fix Special Brand Rate under Rule 7 of the Drawback Rules, 1995 in respect of 4 Shipping bills of dates prior to 30.12.2011, the appeal in respect of the other 4 shipping bills should be treated as having been rejected for the purpose of fixation of special brand rate under Rule 7 of the Drawback Rules, 1995. The letter dated 30.12.2011 which has been held by the Commissioner (Appeals) being neither a Board's Circular nor having been put in public domain by the Board and as the letter does not interpret a statutory provision of the Customs Act relating to sanction of drawback there is no question of this letter being cited as the basis for rejection of application for fixation of Brand rates under Rule 7 in respect of 4 shipping Bills pertaining to January 2012.

d) Additional Commissioner, Pune did not process their application for fixation of Brand rate and he proceeded to reject the application on the basis of a letter issued by the Drawback Directorate F.No. 606/04/2011-DBK dated 30.12.2011 on the ground that they had not mentioned Drawback Sub-serial No.9801 in the shipping Bill while accepting payment of drawback at All Industry Rate, thereby showing complete non-application of mind to the facts of the case.

Revision Application 380/37/DBK/2013-RA

6. Being aggrieved by the Order in Appeal, viz. PIII/RP/03&04/ 2013 dated 07.01.2013 to the extent it directed the Additional Commissioner (BRU), central Excise, Pune-III to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 in respect of Shipping Bills covered in Appeal No. 210/2012 and Appeal No. 228/2012 (except 4 shipping bills mentioned at para 3.3 supra) Commissioner, Central Excise, Pune-III has filed this Revision Application mainly on the following grounds:-

a) As per the law and procedure as applicable during the relevant period, an exporter at the time of filing Shipping Bill has to specifically indicate the sub-/Tariff Item no. of the Drawback Schedule, under which he intends to claim the Drawback in respect of goods exported. However, in case he intends to file application for fixation of Special Brand rate of Drawback he is required to indicate sub-serial/Tariff Item No. 9801 in Shipping Bill. However, the assessee in this case have not indicated their intention to file application(s) for fixation of Special Brand Rate of Drawback at the time of export by indicating/mentioning the tariff item no. 9801, in the respective Shipping Bills. Instead, they have mentioned/declared sub-serial/Tariff Item No. 7019 of the Drawback schedule, in the respective Shipping Bills for claiming AIR drawback as specified in the Drawback Schedule. Since the assessee have claimed/ availed AIR drawback as specified in the Drawback schedule in their Shipping Bills, they are not eligible to claim Special Brand Rate of

Drawback under Rule 7 and Rule 3 (The department has reproduced both Rules 7 & 3).

b) The said issue has been clarified by the Central Board of Excise & Customs vide letter F.No. 606/04/ 2011-DBK dated 30.12.2011, addressed to the Commissioner, Central Excise, Pune-I (Letter is reproduced by the department). These clarifications issued by the Board make it evidently clear that the provisions of Drawback Rules do not provide that an exporter can avail the AIR Drawback first at the time of export under specified sub-serial/tariff item no. of the AIR schedule and then file for determination of the Brand Rate under Rule 7. Therefore, it is clear that since the assessee have already claimed/availed the AIR Drawback in respect of goods exported in respect of the Shipping Bills in question, they are not eligible/entitled to claim fixation of Special Brand rate of drawback under Rule 7. Hence, the rejection of applications filed by the assessee under rule 7 by the original authority i.e. Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate was legal, just and fair.

c) The customs manual has laid down procedures clearly in respect of claiming duty draw back. It categorically states that the brand rate of duty drawback is to be claimed by the exporter at the time of export and the requisite details need to be specified in the relevant part of the Shipping Bills. This aspect has also been examined by CBEC and the above clarifications vide ministry letter F. No. 606/04/2011-DBK dated 30.12.2011 have been issued.

d) The Customs Manual explains the procedure for claiming duty drawback categorically 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 bill.

e) The assessee is well aware of the fact that the claim for filing duty drawback is filed in the JNCH, Nhava Sheva as per the EDI Procedures in this respect. They are well aware of the procedures and rules to be followed by them in terms of Public Notices issued by Customs Houses on the subject. Hence they are bound to follow the instructions given in Public notice for following the EDI Procedure.

f) It is also extremely 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.

g) In the present case under consideration, the exporter declares in the shipping bill only to avail AIR of drawback by mentioning the relevant S.S. No. After opting to avail AIR of duty drawback under Rule 3 at the time of export by declaring so in the respective shipping bill, the exporter subsequently filed application seeking fixation of brand rate under Rule 7 for the same export goods. This is contrary to the option already exercised by the exporter in the relevant shipping bill by way of explicit declaration. As per the clarification issued by the CBEC, such claims are contrary to the statutory provisions relating to duty drawback.

7. **Revision Application 371/64/DBK/2013-RA**

The case in brief is that M/s Gartech Equipment Pvt. Ltd. Pune had filed appeals before Commissioner of Central Excise (Appeals-III) Pune against the rejection of Brand Rate applications by Deputy Commissioner (BRU), Central Excise, Pune-III Commissionerate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (Drawback Rules) vide Letter F.No.49/MBI/P-III/BRU/44/12-13 dated 27.11.2012

7.1 Commissioner (Appeals) vide Order in Appeal No. PUN-EXCUS-003-APP-154-12-13 dated 11.06.2013 upheld Order/Letter F.No.49/MBI/P-III/BRU/44/12-13 dated 27.11.2012 passed by Deputy Commissioner (BRU), Central Excise, Pune-III Commissionerate.

8 Being aggrieved with the Order in Appeal No. PUN-EXCUS-003-APP-154-12-13 dated 11.06.2013, M/s Gartech Equipment Pvt. Ltd. has filed Revision Application No. 371/64/DBK/2013-RA mainly on the following grounds:-

a) The most crucial question to be decided by the Revision Authority is whether Board's letter dated 30.12.2011 can change the provisions relating to sanction of drawback at All Industry Rate of fixation of Special Brand Rate under Rule 7 of the Drawback Rules or provisions contained in the Customs Manual. The obvious answer is "no". C. It has also to be decided whether the letter dated 30.12.2011 falls in the category of Rules/Regulations/Instructions issued under Section 151A, 156, 157 or 158 of the Customs Act, 1962. Hereto the answer is no.

b) The letter dated 30.12.2011 was in response to queries raised by Pune-I Central Excise Commissionerate and in pursuance of this letter no Public Notice was issued in Pune-III Central Excise Commissionerate. The Commissioner, Central Excise Pune —III has confirmed to Commissioner (Appeals) that no Public Notice was issued in Pune Commissionerate and reference was made to a Public Notice issued by Jawaharlal Nehru Custom House, Nhava Sheva. In such a situation it has to be decided whether the requirement of mentioning Sub-Serial/Tariff Item No.9801 on the shipping bills at the time of claiming All Industry Rate Drawback is binding in case of exporters who are exporting their products through Pune Commissionerate. The obvious answer is in the negative.

c) Commissioner (Appeal) has taken note of that in pursuance of letter dated 30.12.2011 there has been no amendment of the existing provisions in the Customs Manual or Drawback Rules. The Tariff Item No.9801 continues to be a fictitious and non-existing Tariff Item which is not included in the Drawback Schedule.Therefore, it needs to be considered whether the letter dated 30.12.2011 is having legal force to impose the requirement of mentioning the sub serial/Tariff

Item No.9801 on the shipping bills at the time of claiming drawback at All Industry Rate. The answer to the above question is again in the negative.

d) It is also reiterated that the authority for fixation of Brand Rate or Special Brand Rate is the Drawback Rules, 1995 and the relevant Rules are Rule 3 and Rule 7 and the instructions contained in the Customs Manual. It is submitted that the Board's letter dated 30.12.2011 has not amended Rule 3 and Rule 7 of the Drawback Rules, 1995. Further the Customs Manual has not been amended to include the letter dated 30.12.2011, stipulating that if after claiming All Industry rate under Rule 3 of the Drawback Rules, 1995, request is made for fixation of Brand Rate / Special Rate, then an imaginary, fictitious sub-Rule/Tariff Item No.9801 has to be mentioned in the shipping bill. Further, the letter dated 30.12.2011 is not in the nature of Rules/Regulations or instructions issued under Section 151A, 156 or 157 or Section 158 of the Customs Act, 1962. It is in the nature of a clarification issued to Commissioner Central Excise Pune-I in response to his letter and cannot be treated as Board's Instructions amending the existing Drawback Rules and Instructions contained in the Customs Manual.

e) The Tariff Item No.9801 has not been included in the Drawback Schedule nor has it been mentioned in the instructions contained in the Customs Manual nor was any Public Notice issued in the Pune-III Commissionerate on receipt of the above mentioned letter dated 30.12.2011. It is therefore, prayed that the Order-in-Appeal dated 03.06.2013 passed by the Commissioner (Appeal) of Central Excise, Pune -III Commissionerate may be set aside and the Deputy Commissioner (BRU) Pune -III, Commissionerate may be directed to fix Special Brand rate and the amount of Rs. 3,16,857.00 may be sanctioned to the applicant.

f) However, it may be pointed out that the Revision Authority will find it difficult to accede to our prayer, as it has passed an order without properly appreciating the legal position reg. fixation of brand rate/special brand rate under Rule 7 of the DBK Rules when an exporter has already claimed drawback at All Industry Rate. The Revision Authority which is the second Appellate Forum has also passed an order which is outside the provisions of the Customs Act, Drawback Rules, Instructions contained in the Customs Manual. In this connection reference is invited to Order No.121/2013-Cus. Dated 22.5.2013 passed by Government of India in respect of M/s. Thermax Ltd. Pune wherein the rejection of fixation of Special Brand Rate under Rule 7 of the Drawback Rules after getting drawback at All Industry Rate under Rule 3 of Drawback Rules has been upheld. (para 8.2 of the para 8.2 of the GOI Order is reproduced).

g) Moreover, exporter has to carefully choose a scheme which is beneficial to him at the time of filing Shipping Bill. After choosing a scheme he cannot be allowed to change it subsequently. In CBEC Circular No.10/2003-CUS dated 17.02.2003, it was 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. This circular did not stipulate that

exporter can first claim drawback at AIR rate and subsequently apply for brand rate. The CBEC has clarified the said position further in their letter F.No.604/04/11-DBK dated 30.12.2011 discussed above. Therefore, the said clarification is legal & proper and there is no reason to ignore the same. The similar view was taken by this authority in the case of M/s. Sandvik Asia in GOI Order No.17/12-CUS dated 21.02.2012 and subsequent order No.96-101/13-CUS dated 01.04.2013. The ratio of said GOI Revision orders is squarely applicable to this case." It is thus seen that the Government of India has passed Revision orders on the basis of Instructions dated 30.12.2011 not only in the case of M/s. Thermax Ltd. Pune but also in the case of M/s. Sandvik Asia in Government of India order No.17/12-Cus dated 21.2.2012 and subsequent order No.96-101/13-Cus dated 01.04.2013. It is submitted that unless the orders passed by Government of India in M/s. Thermax Ltd. Pune and M/s. Sandvik Asia is tested in any High Court or Supreme Court, the Revision Authority will continue to uphold all orders passed by officers of the Commissionerate/Commissioner (Appeals) rejecting the request for fixation of Special Brand Rate under Rule 7 of the Drawback Rules after getting drawback at All Industry Rate under Rule 3 of the Drawback Rules.

9. A personal hearing in this case was held on 28.01.2021 through video conferencing which was attended online by Shri V.K Agrawal, Counsel, on behalf of M/s Gartech Equipment Pvt. Ltd. No one appeared on behalf of the Department. The counsel reiterated the submissions. After stating facts of the case briefly, Shri V.K Agrawal, Counsel submitted that neither Section 75 nor Drawback Rules restrict claiming Special Brand Rate after availing All Industry Rate and that letter F.No.604/04/11-DBK dated 30.12.2011 cannot take away what is granted by law. He submitted that Bombay High Court in M/s Alfa Laval (India) Ltd. and in subsequent cases has already decided the issue. He requested that the Synopsis submitted by him during the previous personal hearing on held on 03.03.2020 be taken on record.

10. Government has carefully gone through the relevant case records available in case files, oral & written submissions/synopsis and perused the Order-in-Original and the impugned Order-in-Appeal. As the issue involved in all these 3 Revision Applications is the same, they are being disposed off vide this common order.

11. Government observes that in this case the applicant had exported certain goods and claimed All Industry Rate (AIR) of Drawback as determined under Rule 3 of the Customs, Central. Excise, and Service Tax Drawback Rules, 1995 (herinafter referred to as "DBK Rules"), as per sub-serial No. of the Drawback Schedule as mentioned/claimed in the respective Shipping Bills. After availment of the said

Drawback, they subsequently filed applications for fixation of Special Brand Rate of Drawback under Rule 7(1) of DBK Rules. The said applications filed by M/s Gartech Equipment Pvt. Ltd. had been rejected by the Additional Commissioner (BRU), Central Excise, Pune-III vide Letter F.No.143/MBI/P-III/BRU/125/11-12 dated 08.05.2012 and Letter F.No.228/MBI/P-III/BRU/204/11-12 dated 23.05.2012. On appeal being filed by M/s Gartech Equipment Pvt. Ltd. Commissioner of Central Excise (Appeals-III) Pune vide Order in Appeal No. PIII/RP/03&04/ 2013 Dated 07.01.2013 set aside the Order/Letter of Additional Commissioner dated 08.05.2012 and directed him to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 covered in letter dated 08.05.2012. However, as regards rejection Order/Letter dated 23.05.2012 Commissioner (Appeals) directed Additional Commissioner to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 in respect of four Shipping Bills. However, he did not pass any Order either confirming or modifying or annulling the decision of rejection of the applications for fixation of Special Brand rate under Rule 7 ibid, by the Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate in respect of their applications in respect of 4 shipping bills pertaining to period January 2012 which were rejected by Additional Commissioner vide letter dated 23.05.2012.

12. Being aggrieved by the Order in Appeal No. PIII/RP/03&04/ 2013 dated 07.01.2013 to the extent it did not pass Order on 4 shipping bills pertaining to period January 2012, M/s Gartech Equipment Pvt. Ltd. filed Revision Application No.371/29/DBK/2013-RA against Order in Appeal No. PIII/RP/03&04/ 2013 Dated 07.01.2013. Being aggrieved by the direction of Commissioner (Appeals) to fix Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 covered in letter dated 08.05.2012. and 23.05.2012 (4 Shipping Bills), the Commissioner, Central Excise, Pune-III filed Revision Application No.380/37/DBK/2013-RA against the said Order in Appeal.

13. The Revision Application No. 371/64/DBK/2013-RA has been filed by M/s Gartech Equipment Pvt. Ltd. against Order in Appeal No. PUN-EXCUS-003-APP-154-12-13 dated 11.06.2013 which upheld Order/Letter F.No.49/MBI/P-III/BRU/44/12-13 dated 27.11.2012 passed by Deputy Commissioner (BRU), Central Excise, Pune-III Commissionerate which rejected Brand Rate applications

filed by M/s Gartech Equipment Pvt. Ltd. filed under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

14. Government observes that during the relevant time The CBEC had issued an instruction vide file No.606/04/2011-DBK dated 30.12.2011 wherein under para 2(d) a restriction for claiming brand rate of drawback was provided. It was clarified that where the exporter had claimed drawback under the All Industry Rate (AIR) of drawback at the time of export, they cannot request for fixation of brand rate for drawback where he finds that the drawback sanctioned under AIR is lesser than 4/5th of duties paid. By this instruction it was insisted that prior to filling of shipping bill, the exporter himself has to determine whether to opt for AIR or brand rate of drawback.

15. Since the said instructions/clarification were issued on 30.12.2011, Commissioner (Appeals) vide Order in Appeal No. PIII/RP/03&04/ 2013 dated 07.01.2013 held that the said clarification dated 30.12.2011 has only prospective effect and M/s Gartech Equipment Pvt. Ltd.are entitled for fixation of Special Brand rate under Rule 7 of the DBK Rules in respect of goods exported under all shipping bills covered vide rejection letter dated 08.05.2012 and 4 shipping bills pertaining to period 07.12.2011 to 22.12.2011, covered vide rejection letter dated 23.05.2012. As against this, the department observed that the customs manual has laid down procedures clearly in respect of claiming duty draw back categorically stating that the brand rate of duty drawback is to be claimed by the exporter at the time of export and the requisite details need to be specified in the relevant part of the Shipping Bills and this aspect has also been examined by CBEC and in view of the clarifications issued vide Ministry letter F. No. 606/04/2011-DBK dated 30.12.2011 claims / application for fixation of Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 are contrary to the statutory provisions relating to duty drawback.

16. The Central Board of Excise & Customs vide letter F.No.606/04/2011-DBK dated 30-12-2011, addressed to the Commissioner, Central Excise, Pune-I, has clarified as under :-

> *(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 & taxes suffer 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 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 & taxes suffered and also whether he wants to apply 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 export 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 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 or 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. Exporters declaration of tariff item number other than 9801 on the Shipping Bill declaration that he is satisfied with the AIR rate and opts for it. Any other interpretation would undermine the entire EDI procedure in this respect.

17. The Hon'ble Bombay High Court in the case of Alfa Laval (India) Ltd.[2014(309)ELT 17(Bom)] while deciding writ petition No. 1098 of 2013 had held that CBEC cannot incorporate restriction which does not find place in the Drawback Rules. It was also held that there is no restriction/prohibition in the Drawback Rules to claim drawback under brand rate when drawback already claimed under AIR was found to be less and CBEC by way of Circular cannot

impose restriction which is not there in the rules. The High Court thus struck down the portion of the Circular which was not in line with the Drawback Rules and held that exporters who claimed drawback at the AIR can also request for determination of brand rate of drawback to claim differential amount of drawback.

18. The Hon'ble Bomaby High Court in its Order dated 01.09.2014 at para 23 & 24 observed 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".

19. In the matter of the Board Circular/letter F.No. 606/04/2011-DBK dated 30th December, 2011, the Hon'ble High Court at para 26 of its order observed that

> *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.*

20. Government also notes that Board vide Circular No. 1063 /2/2018 – CX dated 16.02.2018 issued on the subject **"Orders of Supreme Court, High Courts and CESTAT accepted by the Department and on which no review petitions, SLPs have been filed"**, has issued a list of cases accepted by the department. Para 13 of the said Circular is reproduced below:

13. Decision of the Hon'ble High Court of Bombay dated 03.11.2014 in WP No. 2920/2014 in the case of JCB India Ltd vs UOI & Ors and WP No. 9431/2014 in the case of Sandvik Asia Pvt. Ltd vs UOI.

13.1 Department has accepted the aforementioned order of the Hon'ble High Court where the Hon'ble Court disposed of the Writ Petitions by relying on its earlier decisions dated 01.09.2014 in case of M/s Alfa Laval (India) Ltd and M/s Sandvik Asia Pvt. Ltd.

13.2 The issue that was examined was whether prior to 22.11.2014, statutory provisions did not prevent the party to first claim the benefit of AIR Drawback and thereafter claim Brand Rate Drawback.

As such Hon'ble Bombay High Court's order dated 01.09.2014 in the case of Alfa Laval (India Ltd.) has attained finality.

21. Government also observes that subsequently, CBEC issued a notification No. 109/2014-Cus. (N.T) dated 17.11.2014. The said notification has brought an amendment in Rule 7 of the Drawback rules to curtail availment of brand rate of drawback where the exporter has already availed drawback under AIR while exporting the goods.

22. It is settled law that unless otherwise expressly specified, notifications come into effect prospectively and since the Notification No. 109/2014-Cus. (N.T) mentions the effective date as 22.11.2014 the amendment will not be applicable to the past period. As such the judgment of the Hon'ble Bombay High Court in the case of Alfa Laval (India) Ltd.[2014 (309) E.L.T. 17 (Bom.)] will hold the field while deciding all the three Revision Applications in hand.

23. As the applications for fixation of Special Brand rates in the instant cases relate to period prior to 22.11.2014, Government holds that M/s Gartech Equipment Pvt. Ltd. are entitled for fixation of Special Brand rate under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 in respect of goods exported under all shipping bills covered vide rejection letters F. No.143/MBI/P-III/BRU/125/11-12 dated 08.05.2012, F. No.228/MBI/P-III/BRU/204/11-12 dated 23.05.2012 (including four shipping Bills pertaing to period January 2012) issued by Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate and F. No.49/MBI/P-III/BRU/44/12-13 dated 27.11.2012 passed by Deputy Commissioner (BRU), Central Excise, Pune-III

Commissionerate, under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

24. In view of the above discussion, Government upholds Order in Appeal No. PIII/RP/03&04/ 2013 dated 07.01.2013 and sets aside Order in Appeal No. PUN-EXCUS-003-APP-154-12-13 dated 11.06.2013, both passed by the Commissioner (Appeals-III), Central Excise, Pune and remands the cases back to the original authority with a direction to accept the applications of the applicant for fixation of Brand Rate and process the same as per the provisions of Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

25. Revision Applications bearing Nos. 371/29/DBK/2013-RA & 371/64/ DBK/ 2013-RA filed by M/s Gartech Equipment Pvt. Ltd., Pune are allowed with consequential relief and Revision Application No. 380/37/DBK/2013-RA filed by the Commissioner of Central Excise, Pune-III is rejected being devoid of merits.

30/07/21
(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 176-178/2021-CUS (WZ) /ASRA/Mumbai DATED 30.07.21

To,

(1) M/s Gartech Equipment Pvt. Ltd.
Gat No.137/138, Village Chale,
Tal. Mulshi, Pune 412 108

(2)Commissioner of Central Goods & Services Tax, Pune-I, GST Bhavan (Ice House), 41/A Sassoon Road, Opp. Wadia College Pune-411001

Copy to:

1. Commissioner of Central Goods & Services Tax, Pune Appeals-I, GST Bhavan, F Wing, 3rd Floor, 41-A,Sassoon Road, P.B. No. 121, Pune-411001
2. The Deputy Commissioner, Division-II (PIMPRI): GST Bhavan, Dr. Ambedkar Marg, Near Akurdi Railway Station, Akurdi-411044.
3. Sr. P.S. to AS (RA), Mumbai.
4. Guard file.
5. Spare Copy.