REGISTERED SPEED POST AD

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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. 195/407/2013-RA/180 Date of Issue: 16.02.2022

ORDER NO. 178 /2022-CX (WZ)/ASRA/MUMBAI DATED 14.02 2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Dow Chemical International Pvt. Ltd.
1st Floor, Block B, 02 Godrej Business District,
Pirojshanagar, LBS Marg, Vikhroli(West),
Mumbai 400 079

Respondent : The Commissioner of CGST & Central Tax, Raigad

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. US/944/RGD/2012 dated 28.12.2012 passed by the Commissioner(Appeals), Central Excise, Mumbai-II.

ORDER

The revision application has been filed by M/s Dow Chemical International Pvt. Ltd., 1st Floor, Block B, 02 Godrej Business District, Pirojshanagar, LBS Marg, Vikhroli(West), Mumbai 400 079(hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/944/RGD/2012 dated 28.12.2012 passed by the Commissioner(Appeals), Central Excise, Mumbai-II.

2. The applicant had filed five rebate claims before the Maritime Commissioner, Raigad. After following due process of law, the Deputy Commissioner(Rebate), Central Excise, Raigad rejected the rebate claims on certain grounds vide his OIO No. 998/11-12/DC(Rebate)Raigad dated 21.06.2012.

3. The applicant being aggrieved by the OIO filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) took up the case for decision after granting the applicant an opportunity for personal hearing. He found that the submission of certificate of duty payment in Part A of the triplicate copy of the ARE-1's by the competent authority was one of the mandatory requirements to establish payment of duty on the goods exported. He further noted that the applicant had not exported the goods directly from a factory or warehouse. On the basis of these findings, the Commissioner(Appeals) rejected the appeal filed by the applicant vide his OIA No. US/944/RGD/2012 dated 28.12.2012.

4. Aggrieved by the OIA No. US/944/RGD/2012 dated 28.12.2012 passed by the Commissioner(Appeals), Mumbai-II, the applicant filed revision application on the following grounds:

(a) The findings of the Commissioner(Appeals) are erroneous, legally as well as factually incorrect. Rebate should be allowed in view of the fact that Rule 2(h) of the CER, 2002 of the CER, 2002 defines "warehouse" as any place or premises registered under Rule 9 of the CER, 2002. Since their unit at Bhiwandi is a first stage dealer and registered under Rule 9 of the CER, 2002, therefore the condition no. 2(a) of the

Notification No. 19/2004-CE(NT) dated 06.09.2004 which requires export of goods directly either from a factory or a warehouse had been fulfilled. The applicant had purchased the goods from various suppliers and cleared the goods under ARE-1 prepared by them and therefore rebate should be allowed to them. In this regard, the applicant placed reliance upon the judgments In Re : Vinergy International Pvt. Ltd.[2012(278)ELT 407(GOI)] and In Re : Jubilant Organosys Ltd.[2012(286)ELT 455(GOI)].

(b) The judgment of the Hon'ble High Court of Himachal Pradesh in the case of Indian Overseas Corpn.[2009(234)ELT 405(HP)] which had been relied upon by the Commissioner(Appeals) was not applicable to the facts of the present case. It was contended that the Hon'ble High Court had dealt with the issue relating to Notification No. 41/94-CE(NT) and at the relevant time the CBEC Circular No. 204/10/97-CX., dated 30.01.1997 was not in force. Therefore, the court had not taken into account the said CBEC Circular. Hence, the ratio of the said judgment cannot be made applicable to the facts of the present case.

(c) The applicant submitted that where duty payment had been made and goods had been exported, rebate should not be denied. Reference was made to clause 8 in Chapter 8 of the CBEC Manual of Supplementary Instructions to contend that rebate should be granted when goods cleared for export under ARE-1 mentioned in the rebate claim have actually been exported and where the duty paid character of the goods is clear. The applicant further submitted that goods actually exported can be co-related with the documents filed by them.

(d) The applicant further stated that there was no dispute about the fact that the goods have been exported under Customs supervision certifying that goods exported are covered by the respective ARE-1 and that they have received foreign exchange. The corroboration of the goods which have been cleared from the factory with those which had been exported can be verified from the ARE-1, duplicate copy of central excise invoice, shipping bill(EP copy), bill of lading, mate

receipt, customs invoice and packing list. It can be seen from these documents that the goods cleared under the excise invoices of suppliers and ARE-1 co-relate with the export documents such as shipping bills, bill of lading, mate receipt, customs invoice and packing list. Moreover, there are endorsements made by the Superintendent of Customs on the shipping bills and ARE-1's. The applicant also placed reliance upon the decision In Re : Cotfab Exports[2006(205)ELT 1027(GOI)] wherein it had been held that where the co-relation of the duty paid goods can be established from the documents and goods are exported, rebate should be allowed.

(e) The applicant submitted that procedural infractions of Notification/Circular etc. are to be condoned if exports have actually taken place. It was further submitted that substantive benefit cannot be denied for procedural lapses. The applicant placed reliance upon the judgments/decisions In Re : Cotfab Exports[2006(205)ELT 1027(GOI)], Atma Tube Products Ltd.[1998(103)ELT 270(Trb)] and Modern Process Printers[2006(204)ELT 632(GOI)] in this regard.

(f) The applicant further submitted that the CBEC had clarified that it is not necessary that assessable value and FOB value should match. They referred CBEC Circular No. 203/37/96-CX. dated 26.04.1996 and stated that the circular has clarified that it is not necessary that AR-4 value and FOB value should match; that AR-4 value is determined under Section 4 of the CEA, 1944 whereas FOB value is determined under Section 14 of the CA, 1962. Since rebate is granted for value determined under Section 4, therefore this value should be considered for grant of refund.

(g) It was submitted that the applicants as first stage dealers had procured goods from various suppliers and subsequently exported them from their own registered premises by debiting the amount through RG23D register which can be seen from the front page of ARE-1. However, the same is mentioned in the ARE-1 which is merely a lapse due to oversight and hence may kindly be condoned and rebate allowed.

(h) The applicant pointed out that the original and duplicate copies of ARE-1 bears endorsement of Customs Officer who has satisfied himself that the same goods had been exported under relevant shipping bills, bills of lading and mate receipt. The triplicate copies of ARE-1 also bear the endorsement of Central Excise Officer who has satisfied himself about export of duty paid goods. Hence, rebate should be granted to them. In this regard, the applicant placed reliance upon the decision In Re : Aduler Fasteners[2007(216)ELT 465(GOI)].

(i) The applicant stated that in respect of RC No. 32062, the triplicate copy of ARE-1 had been misplaced by them and hence it could not be submitted to the Maritime Commissioner. However, the original and duplicate copy of ARE-1 had been submitted to substantiate that the goods had been exported. Hence, this aspect should not result in denial of rebate claim. The applicant placed reliance upon the judgment in the case of Shreeji Colour Chem. Industries vs. CCE, Vadodara[2009(233)ELT 367(Tri-Ahmd)].

(j) The applicant drew attention to Board Circular No. 428/61/98-CX. dated 02.11.1998 wherein it had been clarified that if the manufacturer clears goods for home consumption after payment of duty and the goods are exported by merchant exporter, rebate can be paid without submission of "disclaimer certificate" from the manufacturer. Since this is a procedural lapse, the applicant requested that it may be condoned and rebate be allowed.

(k) With regard to the signature of the authorised signatory not being appended on the manufacturers invoice, the applicant submitted that it was a procedural lapse which may be condoned. They stated that the manufacturers invoice had been attached to substantiate clearance and export of the goods from the factory. They submitted that a procedural lapse had occurred on the manufacturers part and requested that it be condoned and rebate allowed.

5. The applicant was granted opportunity for personal hearing on 16.03.2018, 03.10.2019, 03.12.2019, 10.02.2021, 24.02.2021, 19.03.2021 and 26.03.2021. However, none appeared on behalf of the applicant.

6. Government has carefully gone through the relevant case records, perused the impugned Order-in-Appeal, Order-in-Original and the revision application filed by the applicant. It is observed that the issues involved in the present revision application are essentially twofold; viz. the fact that the goods have not been exported from a factory of the manufacturer and that the duty payment certificate in Part A of the triplicate copy of the ARE-1 has not been issued by the jurisdictional Superintendent of the manufacturer of the exported goods. It is further observed that the Commissioner(Appeals) has rejected the appeal filed by the applicant on these two grounds. It can be seen from the orders of the lower authorities that the goods have been cleared for export by the applicant in their capacity as a registered dealer and not as a registered factory.

7.1 It is observed by the Government that while rejecting the appeal filed by the applicant, the Commissioner(Appeals) has mainly relied upon condition (2)(a) and condition (2)(b) of Notification No. 19/2004-CE(NT) dated 06.09.2004. These two conditions are reproduced below for lucidity.

"(2) Conditions and limitations : -

(a) that the excisable goods shall be exported after payment of duty, directly from a factory or warehouse, except as otherwise permitted by the Central Board of Excise and Customs by a general or special order;

(b) *the excisable goods shall be exported within six months from the date on which they were cleared for export from the factory of manufacture or warehouse or within such extended period as the Commissioner of Central Excise may in any particular case allow;"*

7.2 On going through both the conditions, it can be seen that they mandate that excisable goods shall be exported directly from a factory or warehouse after payment of duty and that they shall be exported within six

months from the date on which they have been cleared for export from the factory of manufacture or warehouse and also allow for exceptions which the CBEC and the Commissioner of Central Excise may specifically allow. The fact that the goods have not been exported from a factory is clear. However, it is apparent from a simple reading of these conditions that the notification contemporises the terms "factory" and "warehouse" in both the conditions. The inference that ensues is that the excisable goods after payment of duty can also be exported directly from a warehouse. Similarly, the excisable goods are to be exported within six months from the date on which they are cleared for export from the warehouse. It must be borne in mind that when the text of the notification has in very clear words placed a "factory" and a "warehouse" on par, there is no reason why this parity should be whittled down or disregarded. Ergo, the meaning of the term "warehouse" has to be appreciated and applied with reference to the CER, 2002.

7.3 The definitions set out in Rule 2 of the CER, 2002 include the definition of "warehouse" in clause (h) thereof which reads as under.

"RULE 2. Definitions. – In these rules, unless the .....

(h) "warehouse" means any place or premises registered under rule 9; and"

On going through the definition, the meaning of the term "warehouse" becomes very clear. It is simply any place or premises registered under Rule 9 of the CER, 2002. The next question that would obviously arise is which are the places or premises required to be registered under Rule 9 of the CER, 2002 and the answer to this must be had by having resort to the text of the rule.

"Rule 9. Registration. – (1) Every person, who produces, manufactures, carries on trade, holds private store-room or warehouse or otherwise uses excisable goods, shall get registered :"

In the present case, the applicant has obtained dealer registration to carry on trade in excisable goods with the advantage of passing on the central excise duty paid on these excisable goods to their buyers as CENVAT credit on the basis of invoices issued by them. As such, the words "any place or premises registered under rule 9" appearing in the definition in Rule 2(h) of

the CER, 2002 give it wide amplitude by virtue of which any place or premises which is registered under Rule 9 of the CER, 2002 is deemed to be a warehouse. Therefore, merely by virtue of the fact that the applicant dealers premises is registered under Rule 9 of the CER, 2002, the said premises becomes a warehouse and hence must be treated on par with a factory as envisaged in Notification No. 19/2004-CE(NT) dated 06.09.2004.

7.4 It is observed that the Commissioner(Appeals) has drawn reference to Rule 140 of the CER, 1944 to contend that the definition of warehouse in that rule which allows storage of excisable goods on which duty has not been paid to draw a parallel with Rule 20 of the CER, 2002. He has then gone on to contend that every premises registered under Rule 9 is not a warehouse. Government holds that there is no need to import the definition of "warehouse" in Rule 140 of the CER, 1944 and apply it to the CER, 2002 when the CER, 2002 specifically sets out the definition of "warehouse" in Rule 2(h) of the CER, 2002. Since the notification which has been issued under the statute as a delegated legislation itself is explicit, the principle espoused in the legal maxim *'a verbis legis non-est recedendum'*(from the words of the law, there shall be no departure) must be adhered to.

7.5 In the result, in terms of the conditions set out in the notification, the registered dealer premises of the applicant is a permissible place for export of duty paid goods. The fact that the goods have not been cleared from the factory of the manufacturer of the excisable goods will not disentitle the applicant from the benefit of rebate of central excise duties paid on the exported goods.

8.1 The main other ground for rejection of rebate claims was of the certificate of duty payment in Part A of the triplicate copy of ARE-1 not having been received from the Central Excise Officer having jurisdiction over the factory of manufacturer. It can be seen from the text of the notification that as in the case of clearance for export, both the factory and a warehouse which includes a registered dealer, are authorised to carry out self-sealing

and self-certification. To better appreciate this aspect of the procedures set out in clause (3)(a)(iv) and clause (3)(a)(v), clause (3)(a)(ix), clause (3)(a)(xi) and (3)(a)(xii) of Notification No. 19/2004-CE(NT) dated 06.09.2004, the text of these clauses is reproduced below for ease of reference.

*"(iv) For the sealing of goods intended for export, at the place of dispatch, the exporter shall present the goods along with four copies of application in the Form ARE-1 specified in the Annexure to this notification to the **Superintendent or Inspector of Central Excise having jurisdiction over the** factory of production or manufacture or warehouse;*

*(v) The **said Superintendent or Inspector of Central Excise shall verify** the identity of goods mentioned in the application and **the particulars of the duty paid or payable** and if found in order, shall seal each package or the container in the manner as may be specified by the Commissioner of Central Excise and endorse each copy of the application in token of having such examination done;"*

*"(ix) Where goods are not exported directly from the factory of manufacture or warehouse, the **triplicate copy of application shall be sent by the Superintendent having jurisdiction over the** factory of manufacture or **warehouse, who shall; after verification, forward the triplicate copy** in the manner specified in sub-paragraph (vii);"*

*"(xi) Where the exporter desires self-sealing and self-certification for removal of goods from the factory or warehouse or any approved premises, the owner, the working partner the Managing Director or the Company Secretary, of the manufacturing unit of the goods or the owner of warehouse or a person duly authorised by such owner, working partner or the Board of Directors of such Company, as the case may be, shall certify on all the copies of the application that the goods have been sealed in his presence, and shall send the original and duplicate copies of the application along with the goods at the place of export, and **shall send the triplicate** and quadruplicate copies **of the application to the Superintendent or Inspector of Central Excise having jurisdiction over the** factory or **warehouse** within twenty four hours of removal of the goods;*

*(xii) In case of self-sealing, **the said Superintendent or Inspector of Central Excise shall, after verifying the particulars of the duty paid or duty payable** and endorsing the correctness or otherwise, of these particulars –*

(a) *send to the officer*……."

8.2 It can be seen from these clauses that the notification empowers the Superintendent or Inspector of Central Excise having jurisdiction over a warehouse as the competent authority to verify the particulars of duty paid or duty payable. Therefore, the verification of particulars of duty or duty payable by the Superintendent of Central Excise having jurisdiction over the registered dealer is valid and legal. It is amply clear that the notification does not mandate that the claimant for rebate should compulsorily obtain certificate of verification of duty payment in Part A of the triplicate copy of ARE-1 from the Superintendent having jurisdiction over the factory manufacturing the exported goods. Hence, this ground for rejection of rebate claims does not sustain. The verification certificate given by the Superintendent having jurisdiction over the registered dealer of the applicant is sufficient. As there is parity drawn by notification for exports from a factory and a warehouse registered under Rule 9, likewise verification of duty payment particulars by the jurisdictional Superintendent or Inspector of Central Excise having jurisdiction over the registered dealer would suffice the purposes of procedures laid down in Notification No. 19/2004-CE(NT) dated 06.09.2004 for claiming rebate of duty paid on exported goods.

9. The issue of the FOB value of the goods being lesser than the assessable value of the goods was noticed by the original authority. Needless to say, it is settled law that the FOB value of the goods which is the transaction value of the excisable goods must be taken for computing the rebate of central excise duty paid on exported goods admissible for sanction. Government observes that the applicant themselves have conceded this issue and have in fact given their consent for rebate to be restricted to the FOB value of the export goods before the original authority. The applicant cannot now resurrect this issue and contradict their submission before the original authority. Hence, this new ground raised by the applicant in the revision proceedings cannot be given any credence.

10. Although the absence of signature of the representative of manufacturer on the ARE-1's is not a ground for rejection of appeal by the Commissioner(Appeals), since it was one of the grounds for rejection of rebate claims by the original authority it must be clarified that owner of the warehouse or a duly authorised person can also append his signature on the ARE-1.

11. Government therefore modifies the OIA No. US/944/RGD/2012 dated 28.12.2012 passed by the Commissioner(Appeals) by directing the original authority to re-examine the rebate claims filed by the applicant in the light of the observations recorded hereinbefore and consider the rebate claims for sanction, if otherwise found in order. The exercise of re-examination of rebate claims may be completed within eight weeks of receipt of this order.

14/2/22

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

ORDER No. 178 /2022-CX (WZ) /ASRA/Mumbai DATED 14.02.2022

To,
M/s Dow Chemical International Pvt. Ltd.
1st Floor, Block B, 02 Godrej Business District,
Pirojshanagar, LBS Marg, Vikhroli(West),
Mumbai 400 079

Copy to:

1) The Commissioner of CGST & CX, Belapur
2) The Commissioner (Appeals), CGST & CX, Raigad
3) Sr. P.S. to AS (RA), Mumbai
4) Guard file