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. 371/14/DBK/2013-RA /4194 Date of Issue: 12.08.2024

ORDER NO. 179/2021-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 the Order-in-Appeal No. P-III/MMD/205/2012 dated 27.07.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

Applicant : M/s Nutri Vita Foods Pvt. Ltd.
AESSEAL Compound, Gate No. 85,
At Post Varve, Tal-Bhor, Pune-412 205.

Respondent : Commissioner, Central Excise, Pune-III Commissionerate

ORDER

This revision application has been filed by M/s Nutri Vita Foods Pvt. Ltd., Pune (hereinafter referred to as "the applicant") against the Order-in-Appeal No. P-III/MMD/205/2012 dated 27.07.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

2. The case in brief is that the applicant had made an application to the Commissioner of Central Excise Pune-I on 15.12.2011 for fixation of Brand rate under Rule 7 of the Drawback Rules. The said application was rejected by the Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate vide Order in Original/Letter No. 183/MBI/P.III/BRU/161/2011 dated 24.04.2012

3. Being aggrieved by the abovementioned Order/Letter No. 183/MBI/P.III/BRU/161/2011 dated 24.04.2012, the applicant preferred appeal before Commissioner (Appeals-III), Central Excise, Pune, who upheld the said Order/Letter dated 24.04.2012 issued by the Additional Commissioner (BRU), Central Excise, Pune-III Commissionerate with the following observations:

8. I find that it is an undisputed fact that the appellant in this case had exported certain goods vide Shipping Bill as mentioned in their application for fixation of Special Brand Rate of Drawback and claimed All Industry Rate (AIR) drawback as per sub-serial no. of Drawback Schedule mentioned/declared in the relevant Shipping Bill. It is seen that the appellant has claimed Drawback at the rate applicable under sub-heading no.2106. There is also no dispute about the fact that the Drawback @ AIR as claimed by the appellants has been sanctioned and paid to them by the Customs authorities. The appellants have subsequently filed applications for fixation of Special Brand Rate of Drawback under Rule 7(1) on the grounds that the AIR Drawback is less than four fifths of the actual duty suffered on the goods exported.

9. I find that an 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 the 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/Tariff Item No. 9801, in the Shipping Bill. The appellants, however, 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.8429B of the Drawback schedule, in the respective Shipping Bills for claiming the drawback @ AIR, as specified in the Drawback Schedule. I therefore agree with the adjudicating authority that since they have claimed/availed drawback @ AIR, as specified in the

Drawback schedule in their Shipping Bills, they are not eligible to claim Special Brand Rate of Drawbck under Rule 7.

10. I further find that the said issue has been clarified by the Central Board of Excise and Customs vide letter F.No. 606/04/2011-DBK dated 30.12.2011.

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11. The above mentioned clarifications issued by the Board makes it amply clear that the provisions of Drawback Rules do not provide that an exporter can avail the AIR 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. I therefore hold that since the appellants have already claimed/availed the AIR Drawback in respect of goods exported in respect of the Shipping Bill in question, they are not eligible/entitled to claim fixation of Special Brand rate of drawback under Rule 7. The application filed by appellant under Rule 7 has therefore been rightly rejected and hence I do not find reasons to interfere with the impugned order/letter issued by the Additional Commissioner (BRU) Central Excise, Pune-III Commissionerate. Consequently, the appeal filed by the appellant is liable to be rejected.

4. Being aggrieved with the above Order-in-Appeal, the applicant has filed this Revision Application mainly on the following grounds:

(i) Entry No. 9801 is not a Tariff Heading under Drawback Rules. It is a fictional Tariff Heading merely for functional convenience of the computerized system and for processing of claims under the computerized systems. Applications for fixation of special brand rates, which the Additional Commissioner had power & jurisdiction to consider, inquire into and grant if satisfied, cannot be rejected merely on the ground of non-mentioning of a non existing Drawback Tariff item Drawback No. '9801' in the shipping bills. Thus the rejection of the request for fixation of special brand rate for an amount of Rs. 21,20,098.00 is illegal and not warranted as per the existing legal provisions, rules and instructions. The claim of differential amount of Rs. 21,20,098.00 is permissible by fixation of special brand rates under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995.

(ii) Neither the Additional Commissioner (BRU) Pune III Commissionerate nor the Commissioner (Appeal) Pune -III has alleged that the supporting documents & declarations fail to substantiate the amount of drawback claimed in his application for the fixation of special brand rate @ 80% of the total duty elements involved under Rule 7 of the Rules, ibid. The Additional Commissioner had erred in law in holding that as the appellants had complied with the procedural requirement under circular No. 10/2003, they would have been entitled to drawback as claimed, but they have not mentioned 9801 in the shipping bill, so their application is rejected. The Learned appellate authority erred in relying upon instruction Vide F. No.

606/04/2011-DBK dated 30.12.2011 issued by Senior Technical Officer, Govt. Of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs, to reject the fixation of Special Brand Rate as claimed by them. The said instruction was given in response to a query raised by the Commissioner of Central Excise, Pune-I Commissionerate, vide letters F. No. PUBRU/D-IV/Atlas/47/11 dated 12.10.2011/02.12.2011 regarding the issue raised in the cited letter(s). This letter has been kept confidential and used as an armour to deny fixation of special brand rate. This is not permissible under any legal systems. In response to certain queries the aforesaid note was issued which cannot by any stretch of imagination, be considered as binding authority on the issue of drawback superseding the statutory provisions relating to Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and various circulars issued from time to time.

(iii) Further Chapter 22 of the Customs Manual does not mention either the Circular F. No. 606/04/2011-DBK dated 30.12.2011 or Tariff Item No. 98.01 for the purpose of processing of fixation of brand rate under Rule 7 of the Drawback Rules. Therefore, the public notices issued by Jawaharlal Nehru Custom House and Pune Custom Commissionerate, are not having any legal force to change the existing procedural requirement regarding fixation of brand rate under Rule 7 of the Drawback Rules.

(iv) The Central Government has framed Customs and Central Excise Duties and Service Tax Drawback Rules, 1995 for sanctioning drawback. For this purpose, a schedule is also published by the Central Government from time to time thereby fixing rates of drawback for various goods, which are commonly known as "all industry rate". Drawback on the specified rates is allowed to all exporters irrespective of actual quantum and excisable material used in the manufacture of the concerned exported goods. Fixation of Brand Rates and Special Brand Rates are governed by Board's Circular No.14/2003-Cus. Dated 06.03.2003 as amended and modified vide Circular No.83/2003-Cus dated 18.09.2003 and No.89/2003-Cus dated 06.10.2003. No.108/2003-Cus dated 17.12.2003 and letter No. 609/110/2005-DBK dated 26.08.2005. Brand Rates are applied for, where All Industry Rates of drawback have not been determined in respect of any export product eligible for such drawback (as set out in the Schedule to the Drawback Rules), or where the exporter is not eligible for All Industry Rates because the manufacturer of the product has availed of certain duty free facilities like Advance Licence/DEEC etc., any manufacturer or exporter of such goods may apply under Rule 6 of the Drawback Rules within 3 months of "let export order" to the jurisdictional Commissioner of Customs/Central Excise for the determination of the Drawback rate for his product of specified description/characteristics provided he has also used sufficient duty paid inputs or taxable input services. The period of three months is extendable by Assistant Commissioner/Deputy Commissioner and by six months by Commissioner on payment of prescribed fees for filing Brand rate application or extension of time beyond 3 months.

(v) Applications for Special Brand Rates are made where the All Industry Rate fixed under Rule 3 of the Drawback Rules, 1995 is below 80% (i.e. four fifth) of the

exporter's claimed rate, the exporter under Rule 7 of the Drawback Rules can then apply for fixation of a Special Brand Rate by furnishing the prescribed data.

(vi) Hon'ble Supreme Court's decision in the case of Suchitra Components Ltd. Vs. Commissioner of Central Excise, Guntur reported in 2007 (208) E.L.T. 321 (S.C.) = 2008 (11) S.T.R. 430 (S.C.) is squarely applicable to the present case, wherein it was held that *'beneficial circular has to be applied retrospectively while oppressive circular is applicable prospectively. The circular relied upon by the Deputy Commissioner is oppressive and regressive as it is curbing the statutory rights and privileges granted in favour of the exporter by the Drawback rules and policy'.* Because by reason of a policy, a vested or accrued right cannot be taken away. In Union of India Vs. Asian Food Industries 12006 (204) ELT 8 (S.C.)] the Supreme Court held as follows: *"The Delhi High Court, however, in our view correctly opined that the notification dated 4-7-2006 could not have been taken into consideration on the basis of the purported publicity made in the proposed change in the export policy in electronic or print media. Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of Sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof."*

(vii) It is settled law that Circulars has to be effective prospective only. The circular issued for the purpose of following a uniform practice is to be effective from date of issue and from the date of intimation to the trade. No public notice has been issued by the Pune III Commissionerate. The said letter dated 30.12.2011 is only a reply given on certain doubts raised by Pune I Central Excise Commissionerate. The above finding is given in para 15 of the Order-in-Appeal No. PIII/RP/283/2012 dated 11.12.2012. It is further a settled legal position that in an oppressive circular has prospective effect only, unless it is clearly stated therein as retrospective. The Circular dated 30.12.2011 on the basis on which their claim for fixation of special brand rate was rejected refers to Circular No.10/2003-Cus. Dated 17.2.2003 and the same was issued by the Department of Revenue on the subject "Sanction of All Industry Rate of Duty Drawback pending fixation of Special Brand Rate of Drawback".

(viii) The Public Notice issued by Pune Commissionerate and Jawaharlal Nehru Custom House cannot stipulate mentioning of non-existing and fictitious Tariff Item No.98.01 to deny the fixation of Special Brand Rate which was provided in the earlier Circular No.10/2003 and 14/2003. Those Circulars still exist and the issue involved in the present application is required to be examined as per the procedure prescribed in those Circulars.

(ix) On this issue the applicant has relied upon the ratio of following case laws:

(a) Sal Steel Ltd. Vs. Union of India 2010 (260) E.L.T. 185 (Guj.),

(b) Mahakali Rolling Mills Vs Union of India 2007 (215) ELT 11 (SC),

(c) CCE Rajkot Vs Ellora Times Pvt. Ltd 2008(228) ELT 381(Tri.Ahmd.)

(x) Right to claim differential amount of duty drawback after fixation of special brand rate under rule 7 is a statutory right granted by law. Such a right cannot be denied for any procedural irregularity as it would result in injustice to the appellant. The Additional Commissioner had taken a narrow and legalistic view. He lost sight of the spirit behind granting of drawback. The duty drawback scheme is aimed at neutralizing the input stage duties of Customs and Central Excise suffered in respect of various inputs used in the manufacture of export products. The drawback is mainly intended to encourage exports. Having regard to the object behind the granting of drawback the authorities below were not justified in taking a legalistic view of the declaration made. The rejection of drawback without verifying and without giving any opportunity to the exporters to produce proof was not justified. When drawback was granted at All Industry Rate, there is no basis to hold that intention to claim drawback was not mentioned in the shipping Bills.

(xi) As per Rule 17 of the Duty drawback Rules, 1995 the Central Government on a representation by the exporter can allow the duty drawback by relaxing of any of the provisions of the Drawback Rules as required in a given case. Thus even the statutory Rules can be relaxed to grant and/or allow drawback claims, therefore Additional Commissioner's order of rejection for alleged procedural irregularity is not sustainable. In case the Additional Commissioner thought that there was any procedural lapse on the part of the exporter, he could have sought Central Govt's relaxation although there was no breach of any kind on the part of exporter alleged or noticed by the Additional Commissioner.

(xii) The convenience of the trade and for speedier issuance of the brand rate letters the policy decision was taken that proposals for fixation of brand rate involving duty drawback of more than Rs. 5 lacs, shall be approved by the Additional/Joint Commissioner of Central Excise without any limit. In other words, no proposal for fixation of brand rate of drawback shall be submitted to the Commissioner of Central Excise for approval. Therefore, the Additional Commissioner of Central Excise has the power & jurisdiction to grant the differential amount of drawback. The Additional Commissioner was not required to seek any clarification from the Ministry. Drawback is admissible based on All Industry Rate as per Drawback schedule, pending fixation of brand rate of drawback. The Rules further provides that differential amount of drawback is to be sanctioned when brand rate is issued subsequently. Therefore, even after availing All Industry Rate, the appellant is not barred from applying for fixation of special brand rate.

(xiii) Under Section 12(1) of the Customs Act, 1962, Customs duty shall be levied at such rates on goods imported into or exported out of India. In order, however, to encourage export power is given under Section 25 of the Customs Act to the Central Government that if it is satisfied that it is necessary in the public interest so to do, it may exempt absolutely, or subject to such conditions, goods of specific description from the whole or any part of the duty of customs leviable on them. Section 74 of the Customs Act permits drawback of duty paid on import of goods which have been re-exported without undergoing any process. But in order to

encourage export Section 75 of the Customs Act permits drawback on imported materials used in manufacture of goods which are exported.

(xiv) The Court must construe the relevant provisions to make it workable, rather than make it meaningless. An attempt must always be made to reconcile the relevant provisions as to advance the remedy by the statute, but not to deny the remedy provided under the statute, otherwise, the very purpose or the intention of the statutory provision would manifestly be defeated. The purpose and intention of the legislature for enacting Section 75(1) of the Act, viz., to settle duty drawback on the imported materials used in the manufacture of the goods, which are exported, has to be taken into consideration, before denying the said statutory benefit to the persons are entitled to and any other construction of the rules or notifications or circulars issued thereunder would render the very legislative intention as absurd and meaningless.

(xv) Reliance was placed upon the judgments of Hon'ble Delhi High Court held in Chemicals and Fibres of India Ltd. Vs. Union of India 1984 (16) ELT (Del.), Hon'ble High Court of Kerala held in Bhandari Powerlines Pvt. Ltd. Vs. Union of India 2011 (270) ELT 173 (Ker.), Hon'ble Gujarat High Court held in Stovec Industries Ltd. Vs. Union of India 2011 (265) ELT 192 (Guj.), Mafatlal Fine Spg. & Mfg. Co. Ltd. Vs. CC, Bombay 1988 (33) ELT 540 (Tribunal), Subhash Woollen Mills Vs. Collector - 1985 (21) ELT 850 (Tri.), Piramal Exports Ltd. Vs. CC, Bombay 1986 (25) ELT 723(Tri).

(xvi) The sanction of drawback is governed by provisions of the Customs Act and Drawback Rules and Board Circulars based on the provisions of the act and rules for implementing those provisions and no public notice issued on the basis of a non-existing and imagirary tariff item not existing in the drawback schedule of 2011-2012 and 2012-2013 has the legal authority for changing a prevailing practice and introducing a regressive procedure for denying brand rates or special brand rate involving higher amount on the basis of duty of excise and custom suffered in the manufacture of product being exported. The impugned order passed by the Commissioner (Appeal) has no legal force as the Commissioner (Appeal —III), Central Excise Pune has on the same issue set aside the orders passed by the Additional Commissioner Pune —III, in the case of the Appellant vide Order-in-Appeal No. PIII/RP/03&04/2013 dated 07.01.2013. Reference is also invited to Order-in-Appeal No. PIII/RP/283/2012 dated 11.12.2012 in the case of M/s. DSM India Pvt. Ltd. 401/402. 4th Floor. NSG IT Park, Aundh, Pune — 411 007 in which the Learned Commissioner (Appeal) has set aside the order of Deputy Commissioner, Special Brand Rate Unit, Pune —III, Commissionerate. C9py of said orders are enclosed as Annexure — II.

(xvii) It is a settled proposition that proceedings under Chapter XI VA, XV (section 128, 128A, 129. 129A, 129B, 129C, 129DD, 129E & 129EE) are judicial proceedings and the latest orders on any issue are binding on all formations sub-ordinate to that office. Commissioner (Appeal) has now allowed application for fixation of Special Brand rate in cases where the Heading 98.01 is not mentioned on the basis of existing legal provision, Drawback rules and Board's instructions. Circulars etc. Hon'ble Supreme Court has held that judicial discipline requires that

the Department should pay utmost regard to judicial discipline and give effect to orders of higher appellate authorities which are binding on them. Reliance is placed on the ratiof of the Supreme Court's decision in the case of Union of India Vs. Kamlakshi Finance Corporation reported in 1991 (55) ELT 433 (S.C.).

(xviii) The impugned order in appeal is dated 27.07.2012 whereas the orders passed by the present Commissioner are dated 11.12.2012 and 07.01.2013. As such, the orders dated 11.12.2012 and 07.01.2013 reflect the correct view of the appellate authority and this should settle all doubts to rest. The same may also be made applicable to the present application.

5. A personal hearing in this case was held on 15.01.2021 through video conferencing which was attended online by Shri Ajay Singh, Advocate, on behalf of the applicant. He re-iterated written submissions and drew attention to Decision of Hon'ble Bombay High Court in M/s Alfa Laval (India) Ltd. He also drew attention to OUIA No. P-III/RP/283/2012 dtd. 14.12.2012 on the issue and requested to allow their revision application.

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

7. 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 the applicants had been rejected by the Additional Commissioner (BRU) vide impugned letter/order, on the ground that they failed to indicate their intention to avail Special Brand Rate of Drawback Rules under Rule 7 at the time of export in the relevant Shipping Bills and hence the applications filed by them were contrary to the provisions of Drawback Rules as well as Circulars/Clarification issued by the CBEC.

8. Government notes that in this case the applicant had exported the goods vide Shipping Bills as mentioned in their applications for fixation of Special Brand Rate of Drawback and claimed All Industry Rate (AIR) drawback as per sub-serial no. of Drawback Schedule mentioned/declared in the said Shipping Bills. There was also no dispute about the fact that the Drawback @ AIR as claimed by them

had been sanctioned and paid to them by the Customs Authorities. The applicant subsequently filed applications for fixation of Special Brand Rate of Drawback under Rule 7 of DBK Rules on the grounds that the AIR Drawback is less than fourth fifth of the actual duty suffered on the goods exported. The main question therefore to be decided in the instant revision application is whether the applicant is eligible to file application under Rule 7 of DBK Rules for fixation of Special Brand Rate of Drawback in cases where they have already claimed / obtained the Drawback @ AIR, as specified in the Drawback schedule.

9. Government observes that a similar matter was referred to the Ministry by Pune-I Commissionerate and the Ministry vide letter F. No. 606/04/2011-DBK dated 30.12.2011 clarified that opting for AIR drawback under rule 3 of DBK Rules on the shipping bill disentitles exporter from claiming drawback under Rule 7 of DBK Rules. The Commissioner (Appeals) in his impugned order also relied on this circular to arrive at a conclusion 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.

10. 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.

11. Government observes that M/s Alfa Laval (India) Ltd. vide writ petition No. 1098 of 2013 filed before Hon'ble Bombay High Court sought for quashing of the Circular/letter F.No. 606/04/2011-DBK dated 30th December, 2011 issued by the CBEC to the extent that it purported to clarify that an exporter cannot claim the Brand Rate of drawback under Rule 7 of the Drawback Rules after having availed of the All Industry Rate of drawback under Rule 3 of DBK Rules.

12. The facts of this case are that the petitioner M/s Alfa Laval (India) Ltd.[2014 (309) E.L.T. 17 (Bom.)] submitted to the court that they are entitled to the Brand Rate of drawback in terms of Rule 7, if the All Industry Rate of drawback notified under Rule 3 is less than 4/5th (80%) of the actual duties suffered on the inputs. However the applications filed by the Petitioner under Rule 7 of the Drawback Rules were rejected the by the Pune-I Commissionerate on the ground that the Petitioner had already claimed drawback at the All Industry Rate under Rule 3 and hence the Petitioner was not entitled to now make applications under Rule 7 seeking determination of the Brand Rate of drawback for the very same exports. The Counsel for the Department submitted that once the exporter avails of the All

Industry Rate of drawback as notified under Rule 3, he is deemed to be satisfied with the drawback availed of by him and thereafter he is barred from making any application seeking determination of the Brand Rate of drawback under Rule 7 and this was the case even if the All Industry Rate of drawback granted under Rule 3 was less than 4/5th (80%) of the duties and taxes paid on the inputs / input services used in the production or manufacture of the exported goods. He further pleaded that the exporter has to decide at the time of the export of the goods whether he wants to claim drawback at the notified rate under Rule 3, or at the Brand Rate under Rule 7 and once he chooses to claim drawback under Rule 3, he cannot make a claim for the determination of the Brand Rate of drawback under Rule 7.

13. The Hon'ble Bombay High Court in its Order dated 01.09.2014 [2014(309) ELT 17 (Bom)] 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".

14. 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.

15. Government also notes that Board vide Circular No. 1063/2/2018 – CX dated 16.02.2018 issued on **"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.*

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

17. Thus, it is evident that the issue involved in this Revision Petition is squarely covered by the ratio of aforesaid Hon'ble Bombay High Court's order dated 01.09.2014 in the case of Alfa Laval (India) Ltd.[reported in 2014 (309) ELT 17 (Bom)], which is decided in favour of the applicant and has attained finality as discussed supra. The said judgment has also been accepted by the Central Board of Excise and Customs and hence the ratio thereof is binding for the period prior to 22.11.2014. Government therefore holds that the applicant in the instant case is eligible to file applications under Rule 7 of DBK Rules for fixation of Special Brand Rate of Drawback in cases where they have already claimed / obtained the Drawback @ AIR, as specified in the Drawback schedule.

18. Government sets aside impugned Order-in-Appeal and remands the case back to original authority with a direction to accept the applications of the applicant for fixation of Brand Rate and process the same in terms of Rule 7 of the DBK Rules. Revision application filed by the applicant is disposed off in the above terms.

30/07/21

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

ORDER No 179/2021-CUS(WZ) /ASRA/Mumbai DATED 30.07.2021

To,
M/s Nutri Vita Foods Pvt. Ltd.
AESSEAL Compound, Gate No. 85,
At Post Varve, Tal-Bhor, Pune-412 205.

Copy to:

1. Commissioner of Central Goods & Services Tax, Pune-II, GST Bhavan (Ice House), 41/A Sassoon Road, Opp. Ness Wadia College, Pune-411001
2. Commissioner of Central Goods & Services Tax,Pune Appeals-II, GST Bhavan, F Wing, 2nd Floor, 41-A,Sassoon Road, P.B. No. 121, Pune-411001
3. The Deputy Commissioner, Division-V, Central Goods & Services Tax, Pune-II, WING-B, 1st Floor, 41/A, ICE House, GST Bhavan, Sassoon Road, Pune-411001.
4. Sr. P.S. to AS (RA), Mumbai.
5. Guard file.
6. Spare Copy.