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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.195/182/2014-RA /2744 Date of Issue: 12.04.2021

ORDER NO. 197/2021-CX (WZ)/ASRA/MUMBAI DATED 31.03.2021 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.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014 passed by the Commissioner(Appeals-III), Central Excise, Ahmedabad.

Applicant : M/s Laxmi Sagar Trade Link Pvt. Ltd.

Respondent : Commissioner(Appeals-III), Central Excise, Ahmedabad.

ORDER

This Revision Application is filed by M/s Laxmi Sagar Trade Link Pvt. Ltd, 234, Madhav Darshan, Waghawadi Road, Bhavnagar, Gujarat - 364 001 (hereinafter referred to as "the Applicant") against the Order-in-Appeal No. BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014 passed by the Commissioner(Appeals-III), Central Excise, Ahmedabad.

2. 1 The issue in brief is that the Applicant, a merchant exporter, had filed rebate claims under Section 11B of the Central Excise Act, 1944 read with Rule 18 of the Central Excise Rules, 2002 and Notification No. 19/2004-CENT) dated 06.09.2004 in respect of excisable goods exported by them, for rebate of duty paid on the said goods. The Applicant had procured the said goods from the manufacturers. The assessable value of the said exported goods was higher than the FOB value of the goods. The Assistant Commissioner, Central Excise, Rural Division, Bhavnagar sanctioned the said rebate claims entirely in cash.

2.2 Being aggrieved, the Department filed appeal before the Commissioner(Appeals-III), Central Excise, Ahmedabad on the following grounds :

(i) The adjudicating authority had erred in paying the amount in instead of allowing re-credit in Cenvat amount. The said amount represents the duty paid on post removal expenses like freight and insurance which does not form part of the transaction value. The assessee is not liable to pay duty on CIF value of the goods. The duty is to be paid on the transaction value of goods determined under Section 4 of the Central Excise Act, 1944. The Board vide Circular No. 203/37/96-CX dated 26.4.1996 has clarified that:

"it is the assessable value determined under section 4 of the Central Excise & Salt Act, 1944 which is required to be mentioned on AR 4 (now ARE-1) and the corresponding invoice issued under Rule 52A. This value is relevant for the purpose of Rule 12 and Rule 13 of Central Excise Rules, 1994. FOB value is relevant for Customs purposes and other schemes like drawback, export under DEEC etc."

(ii) Therefore, the value of ARE-1 shall be determined under Section 4 of the Central Excise Act, 1944 and said value determined under the provision of Section 4 is the transaction value which excludes post-removal expenses like overseas freight and insurance and this value is relevant for purposes of Rule 12 and 13 of the erstwhile Central Excise Rules, 1944. Now Rule 18 has been introduced in new Central Excise Rules, 2002 in place of old Rule 12 and 13;

(iii) Similarly, the order in case of CCE Surat-I Vs M/s Rivaa Exports Ltd. Surat passed by the Joint Secretary (RA) vide No.864-869/10-CX dated 26.05.2010, it is held that Rebate in cash is admissible of duty paid on the transaction value as determined under Section 4 of the Central Excise Act, 1944 and not on the duty erroneously paid on the post manufacturing expenses like freight, insurance, CHA charges etc. However, the Government permits the Applicant to take Cenvat credit of the amount which relates to Central Excise duty paid erroneously on freight and insurance charges of goods exported by the Applicant. If the excess amount has already been paid in cash, the same is recoverable;

(iv) Thus, the provision of Section 4(1)(a) and 4(3)(d) of the Central Excise Act, 1944 read with definition of "transaction value", the value in terms of Section 4 ibid, shall be amount that the buyer of exported goods is liable to pay. In the instant case, the buyer of the goods to be exported had paid an amount of duty on CIF value shown in ARE-1 which is contrary to the provision of Section 4 of Central Excise Act, 1944. The correct assessable value as per

Section 4 is the transaction value which always excludes overseas freight and insurance.

2.3 The Commissioner(Appeals) vide Orders-in-Appeal Nos. BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014 allowed the Departmental appeal directed the Applicant to deposit excess amount received in case into the Government account. The details are as given below:

Sr.No.	Rebate amt (Rs.)	ARE-1 No. & dt	Manufacturer	OIO No & dt	OIA No & dt
1	617855	171/11-12 dt 27.12.11	M/s Sanjay Trade Corporation	43/AC/Rural/BVR/Rebate/2012-13 dt 04.05.12	BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014
2	715468	172/11-12 dt 29.12.11	M/s Priya Blue Industries P. Ltd.	44/AC/Rural/BVR/Rebate/2012-13 dt 04.05.12	
3	638054	168/11-12 dt 24.12.11	M/s Dalkan Shipbreaking Ltd	45/AC/Rural/BVR/Rebate/2012-13 dt 04.05.12	
		169/11-12 dt 26.12.11	M/s Sheth Breaking Corporation		
4	716970	157/11-12 dt 30.11.11	M/s Dynamic Ship Recyclers Pvt Ltd	46/AC/Rural/BVR/Rebate/2012-13 dt 04.05.12	
		165/11-12 dt 17.12.11	M/s Bharat Ship Breakers Corporation		
5	452997	162/11-12 dt 13.12.11	M/s Priya Blue Industries P. Ltd.	98 /AC/Rural/BVR/Rebate/2012-13 dt 04.06.12	
6	827072	02/11-12 dt 11.04.12	M/s Bansal Shipping Pvt Ltd.	163/AC/Rural/BVR/Rebate/2012-13 dt 05.07.12	
		03/11-12 dt 13.04.12			
7	773129		M/s M.K. Shipping & Allied Industries Pvt. Ltd	296/AC/Rural/BVR/Rebate/2012-13 dt 08.01.13	
			M/s Unique Shipping Breaking Corporation		
			M/s Bansal Shipping Pvt Ltd.		
8	937346	145/12-13 dt 20.10.12	M/s Navyug Ship Breaking Co.	306/AC/Rural/BVR/Rebate/2012-13 dt 08.01.13	
		149/12-13 dt 20.10.12	M/s Hatmi Steels		

3. Aggrieved, the Applicant then filed the current Revision Application on the following grounds:

(i) The Applicant had filed the rebate claim in the capacity of merchant exporter. The merchant exporter is eligible to get rebate whatever the duty paid at the time of export by the manufacturer. Therefore, the adjudicating authority has rightly sanction rebate claim as per the provisions of law. Therefore, the said Orders-in-Original may be restored.

(ii) The rebate /refund of duty paid on the goods exported is of the duty on the basis of transaction value certified by the Range Superintendent of Central excise while allowing the rebate by the original authority and the said authority found that all the components for grant of rebate are correct and as per the requirements of Rule. It is clearly established that the manufacturers have paid excise duty on excisable goods exported on the value which is inclusive of cost and freight which is contrary to the provisions of Section 4 of the Central Excise Act, 1944 read with the Central Excise Valuation Rules. The correct assessable value as per Section 4 of the Act is the transaction value which always excludes overseas freight and insurance. Therefore, in this case the excise duty is found paid and claimed on C & F value which is against the Section 4 of the Act read with said Valuation Rules.

(iii) As regards FOB value higher that the transaction value, the difference was due to the Applicant purchased the materials as per market rate and the rate difference will come due to market fluctuation. The Applicant exports the materials after they obtained Purchase Order. In the Purchase Order, their party had mentioned rate as per the LME (London Metal Exchange). The FOB value was taken on customs exchange rate. The customs exchange rate will change each month and accordingly it will give effect to FOB value. The Applicant are merchant exporter and they will not get full quantity of the materials together, so the Applicant have to purchase it in partly from different manufacturers and its rate are also different. Sometimes it may be high or low. The Applicant had

applied for the rebate claim on the basis of transaction value as per Section 4 of the Central Excise Act, 1944 and for the export, the port is the place of removal. Therefore, all the expenses up to the port has been included in transaction value and which is as per ARE-1. They placed reliance on the case of CCE Vs Maini Precision Products [2010 (252) ELT 409], where in the Hon'ble Tribunal held that *"Rebate sanctioning authority should not examine the correctness of assessment but should examine only admissibility of rebate of duty paid on goods covered by claim. Goods cleared on payment of duty from the factory premises. But find any reason for interference with impugner order. Impugned order is correct. Appeal of the Revenue rejected."*. In this case, the Hon'ble Tribunal held that rebate is payable even if duty is paid on CIF value. Rebate sanctioning authority is not to examine correctness of assessment (relying on CBEC Circular NO. 510/06/2000-CX).

(iv) If the port of export is considered as place of removal of goods, the expenses incurred up to the place of removal like freight, insurance is built up/ added in the value. Therefore, this is as per Section 4 of the Central Excise Act, 1944 and the duty paid on such elements is also rebateble and covered by above judgment. Reliance was also placed on the judgment of the GOI in the case of Balkrishna Ind. Ltd. [2011 (271) ELT 148].

(v) The Applicant is a merchant exporter and therefore they are not maintaining any Cenvat Register. They are not obliged to pay any excise duty on air/ goods and therefore there is no question of maintaining any Cenvat Register and availing Cenvat credit of duties paid on any goods purchased by them. Rebate of Central Excise duty paid on the exported goods by way of re-credit in favour of a merchant exporter is meaningless because a merchant exporter could not take any benefit of such re-credit. In the case of Orchid Health Care, the Hon'ble Madras High Court has

considered a case of an Export Oriented Undertaking that claimed rebate of duties paid on the exported goods, and the action of the Excise authorities in allowing rebate by way of credit is held to be meaningless and hence illegal and the same principle is applicable in the present case also because the Applicant as a merchant exporter is not required to pay any excise duty and hence credit of duties paid on the goods purchased by the Applicant cannot be utilized by the Applicant in any manner whatsoever.

(vi) The judgement in case of Nahar Industrial Enterprises Ltd. relied upon by the Commissioner(Appeals) for deciding against the Applicant is inapplicable in law as well as in facts of this case. M/s. Nahar industrial Enterprises Ltd. were paying excise duty on a lower price for the goods sold in the local market whereas higher price was declared for same goods when exported for encashing accumulated cenvat credit while discharging duty liability on the exported goods so that refund of a higher amount could be obtained by them. But in the present case, there is no evidence to show that the manufacturers who have sold the goods to the Applicant had sold similar goods, namely waste and scrap of various metals to local buyers at a lower price and that these manufacturers had encashed accumulated Cenvat credit for paying excise duty on the goods sold to the Applicant. Secondly, M/s. Nahar Industrial Enterprises Ltd. was a manufacturer and therefore allowing rebate by way of credit served their purpose since such credit could be utilized for paying excise duties on other goods cleared in domestic market. Here the Applicant is a merchant exporter, not having any excise liability and therefore the Applicant could never utilize such credit for paying excise duty on any other goods.

(vii) The case of M/s Nahar Industrial Enterprises Ltd. was even otherwise a totally distinguishable case because the Applicant had purchased the

goods from various manufacturers to whom the price as well as element of excise duty are paid by the Applicant in cash and this way the entire amount being sum total of price and excise duty for the exported goods was admittedly paid by the Applicant in cash. Thus, in view of all these facts, the decision rendered by the Hon'ble Punjab & Haryana High Court in case of Nahar Industrial Enterprises Ltd. was not applicable at all in the facts of the present case. Further, the Applicant relied in the case of Sun city Alloys Pvt. Ltd.[2007 (218) ELT 174 (Raj.)].

(viii) The Applicant requested to restore Order-In-Originals.

4. Personal hearing was fixed for 10.10.2019 and 20.11.2019, but no one appeared for the hearing. In view of a change in the Revisionary Authority, hearing was granted on 07.01.2021, 14.01.2021, 21.01.2021 and 12.02.2021, however none appeared for the hearing. Hence the case is taken up for decision based on records on merits.

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

6. On perusal of records, the Applicant, merchant exporter had procured the goods from various manufacturers and exported the goods under claim of rebate in terms of Rule 18 of Central Excise Rules. The assessable value of the said exported goods was higher than the FOB value of the goods. The Assistant Commissioner, Central Excise, Rural Division, Bhavnagar vide 08 Order-in-Original sanctioned the said rebate claims entirely in cash (details in Para 2.3 above). The Department filed three appeals against the 08 Order-in-Original on the grounds that as per the provision of Section 4(1)(a) and 4(3)(d) of the Central Excise Act, 1944 read with definition of "transaction value", the value in terms of Section 4 ibid, shall be amount that the buyer of exported goods is

liable to pay before goods leave the port in India. Port of shipment is treated as place of removal in case of exports. Thus FOB value mentioned in the shipping Bill is the correct transaction value for payment of Central Excise duty. However, in the instant case, the Applicant had paid duty on CIF value shown in ARE-1 which is contrary to the provision of Section 4 of Central Excise Act, 1944 as the correct assessable value is the transaction value excluding overseas freight and insurance. Hence the excess amount of rebate which was already been paid in cash, is recoverable. The Commissioner(Appeals) vide Orders-in-Appeal Nos. BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014 held that:

> *"....I hold that the adjudicate authority has erred in sanctioning rebate claim entirely in cash, when the F.O.B. value of the exported goods was lower than the assessable value mentioned in the respective ARE-1s. There is merit in the appeals filed by the Appellant Department. I therefore allow all the three appeals and set aside the impugned orders to that extent. The respondent is required to deposit excess amount received in cash into Government account."*

7. The relevant statutory provisions for determination of value of excisable goods are extracted below:

(i) As per Section 4(1) of Central Excise Act, 1944

> *"(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -*
>
> *(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*
>
> *(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."*

(ii) Word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows :

"(h) 'Sale' and 'Purchase' with their grammatical variations and cognate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."

(iii) Place of Removal has been defined under Section 4(3)(c)(i), (ii), (iii) as *:*

"(i) A factory or any other place or premises of production of manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) A Depot, Premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory."

(iv) The Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also relevant which is reproduced below :-

*"**Rule 5.** Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal up to the place of delivery of such excisable goods.*

Explanation 1. - "Cost of transportation" includes -

(i) The actual cost of transportation; and

(ii) In case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods."

8. From the perusal of above provisions Government finds that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or

any other place of removal from where the excisable goods are to be sold for delivery at place of removal. Further, the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944.

9. Government is in agreement with the findings of the Commissioner(Appeals) that the adjudicating authority has erred in sanctioning rebate claim entirely in cash, when the FOB value of the exported goods was lower than the CIF mentioned in the respective ARE-1s.

10. Government observes that the Applicant in their revision application has submitted that

> *"The Applicant is a merchant exporter and therefore the Applicant is not maintaining any Cenvat Register. The Applicant is not obliged to pay any excise duty on air/ goods and therefore there is no question of maintaining any Cenvat Register and availing Cenvat credit of duties paid on any goods purchased by the Applicant. Rebate of Central Excise duty paid on the exported goods by way of re-credit in favour of a merchant exporter is meaningless because a merchant exporter could not take any benefit of such re-credit."*

11. Government observes that the respective manufacturers are availing the benefit of Cenvat Credit scheme. Government places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016 In RE:Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujart High Court] where in it was held that

> *"9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner does not dispute the stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If therefore, the petitioner's request was for re-credit of*

such amount in Cenvat account, the same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate application for such purpose. The Government of India itself in case of Balkrishna Industries Ltd. (supra), had substantially similar circumstance provided as under :

> *"8. In this regards, Government observed that the revisionary authority has passed a number of orders wherein it has been held that the rebate of duty is to be allowed of the duty paid the transaction value of the goods determined under Section4 of the Central Excise Act, 1944 and the rebate on the amount of duty paid in respect of post clearances expenses like freight and insurances may be allowed as recredit entry in their cenvat account. Since the Government cannot retain the amount collected without any authority of law and the same has to be returned to the applicant in the manner it was paid. Hence, Government observes that the applicant is entitled for the take (sic) credit in their cenvat account in respect of the amount paid as duty on freight & insurance charge. The applicant was not even required to make a request with the department for allowing this recredit in their cenvat account. The adjudicating officer/ Commissione(Appeals) could have themselves allowed this instead of rejecting the same as timebarred."*

10. In the result, the respondents are directed to recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

12. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case.

13. Government holds that the excess paid amount of duty which are not held admissible for being rebated under Rule 18 of CER, 2002, are to be allowed as re-credit in the Cenvat credit account from where the said duty was initially paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944.

14. In view of above, Government modifies the Order-in-Appeal No. BVR-EXCUS-000-APP-177-179-13-14 dated 19.02.2014 passed by the Commissioner(Appeals-III), Central Excise, Ahmedabad to that extent.

15. Revision application is allowed in terms of above.

Shrawan 31/03/21

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

ORDER No. 179/2021-CX (WZ)/ASRA/Mumbai DATED 31.3.2021.

To,
M/s Laxmi Sagar Trade Link Pvt. Ltd,
234, Madhav Darshan,
Waghawadi Road,
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Gujarat - 364 001.

Copy to:

1. The Commissioner, CGST & CX, Bhavan, Siddhi Sadan Building, Plot No. 67-68/B-1, Narayan Bhai Upadhya Marg, Kalubha Road, Bhavnagar, Gujarat – 364 001.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.

ATTESTED

Deodhar 12/04/2021

अधीक्षक
Superintendent
रिवीजन एप्लीकेशन
Revision Application
मुंबई इकाई, मुंबई
Mumbai Unit, Mumbai