REGISTERED SPEED POST

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No. 380/82/DBK/14-RA /4527-4532 Date of Issue: 25/08/2021

ORDER NO. 184/2021 -CUS (WZ) /ASRA/MUMBAI DATED 17.8.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against Order in Appeal No. 67-89/Commr(A) / KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla.

Applicant : Commissioner of Customs, Kandla.

Respondent : M/s Dhanlaxmi Solvex Pvt. Ltd.,
201, Bansi Plaza, 581-MG Road, Indore

ORDER

This revision application has been filed by the Commissioner of Customs, Kandla (hereinafter referred to as "the applicant" or "the Department") against Order in Appeal No. 67-89/Commr(A) / KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla in the case of M/s Cargill India Pvt. Ltd. Gurgaon, Haryana and 22 others including M/s Dhanlaxmi Solvex Pvt. Ltd., Indore (respondent).

2. The brief facts of the case are that M/s Cargill India Pvt. Ltd. Gurgaon, Haryana and 22 others including M/s Dhanlaxmi Solvex Pvt. Ltd., Indore (respondent) are either manufacturers or exporters and engaged in export of various agricultural products including Soya Bean De Oiled Cake (hereinafter referred to as DOC for brevity) falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975.

3. An intelligence gathered by the Directorate General of Central Excise Intelligence (DGCEI), Regional Unit, Indore indicated that the DOC exported by them were manufactured by availing the benefit under Rule 19(2) of the Central Excise Rules 2002 by procuring hexane without payment of Central Excise duty by following the procedure as prescribed under Rule 19(2) of the Central Excise Rules, 2002 and notifications issued thereunder. The said hexane procured without payment of central excise duty was used in the manufacture of DOC and such DOC was exported by them under claim of duty drawback @ 1% of FOB value as per All Industry Rate of Drawback (Sr. No. 23) prescribed vide Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 superseded by Notification No. 103/2008-Cus(NT) dated 29.08.2008.

4. In view of the provisions of Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and condition 7(f) of the Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007(and other similar notifications), it appeared that All Industry Rate of Drawback specified under the Schedule annexed to Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007, as amended, from time to time(and other similar notifications) are not admissible on export of DOC if the same is manufactured in terms of sub-rule (2) of Rule 19 of the CER, 2002 by using excisable material(hexane) in respect of which duties have not been paid.

5. The case was investigated by DGCEI, Indore and show cause notices issued to M/s Cargill India Pvt. Ltd. Gurgaon, Haryana and 22 others including M/s Dhanlaxmi Solvex Pvt. Ltd., Indore (respondent) calling upon them to show cause as to why the their Drawback claim should not be disallowed and why penalty should not be imposed upon the exporter, its Director and the manufacturer. The case was adjudicated by the Additional Commissioner (DBK), Custom House, Kandla who ordered recovery of the drawback amount along with interest and imposed penalty on M/s Cargill India Pvt. Ltd. Gurgaon, Haryana and 22 others including M/s Dhanlaxmi Solvex Pvt. Ltd., Indore(OIO No. KDL/DBK/1628/ADC/SS/2013-14 dated 04/09.12.2013).

6. Being aggrieved, M/s Cargill India Pvt. Ltd. Gurgaon, Haryana and 22 others including M/s Dhanlaxmi Solvex Pvt. Ltd., Indore (respondent) filed appeal before Commissioner (Appeals) on various grounds. Commissioner (Appeals) vide his Order in Appeal No. 67-89/Commr(A) / KDL/2014 dated 10.03.2014 observed that the exporter will be eligible for 1% drawback even if the appellant has availed benefit under Rule 19(2) of CER 2002, in view of the fact that conditions specified under Notification No. 81/2006-Cus. (NT) dtd 13.07.2006 and Notification No. 103/2008-Cus. (NT) dtd. 29.08.2008 regarding availment of Rule 19(2) are identical. Besides this, he also found that amount of drawback had been claimed @ 1% on FOB value as Customs allocation in terms of chapter 23 of drawback schedule as per Notification No. 103/2008-Cus. (NT) dtd. 29.08.2008. Further, he also found that Board vide Circular No. 35/2010 dated-Cus. Dtd. 17.09.2010 has clarified that the Notification No. 84/2010-Cus. (NT) dated 17.09.2010 provides that Customs component of AIR drawback shall be available even if rebate of Central Excise Duty paid on the raw material used in the manufacture of the export goods has been taken in terms of Rule 18 of Central Excise Rules 2002 or if such raw materials were procured without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules 2002. He emphasized that Board's circular which gives clarification relating to existing law/provisions of Notification, would apply equally to any law/notifications issued earlier if the provisions are identical. In this regard he also relied upon the decisions in the cases of Mars International 2012 (286) ELT 146 (GOI) and Aarti Industries Ltd.-2012 (285) ELT 461 (GOI). Commissioner (Appeals) concluded that even though the amendment in the provisions in the superseding Notification No. 84/2010-Cus. (NT) dated 17.09.2010 came in force only on 20.09.2010, the board's circular makes it clear that drawback would be admissible even if the rebate of Central Excise duty paid on raw material used in

the manufacture of export goods has been taken in terms of Rule 18 of Central Excise Rules 2002 or if such raw materials were procured without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 and accordingly set aside concerned Orders in Original passed by the Additional Commissioner of Customs, Kandla.

7. The Commissioner of Customs, Kandla found that the Order in Appeal No. 67-89/Commr (A) / KDL/2014 dated 10.03.2014 was not legal and proper and therefore directed the Assistant Commissioner of Customs (DBK) Customs House, Kandla to file revision application on the following grounds :

(i) The appellants had availed drawback on the De Oiled cake (DOC)/Soyabean Meal (SBM) which was manufactured availing facility of Rule 19(2) of the Central Excise Rules, 2002. As per condition 7 (f) of Notification No.81/2006 Cus(NT) and 68/07 Cus (NT) and condition no 8(f) of Notf. NO.103/2008 Cus(NT):-

> *(7) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is -*
>
> *(f) manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002;*

Thus, notification denies the drawback of the entire schedule (whether Excise or Customs components), if the facility of rule 19(2) of the Central Excise 2002 is availed. **The said conditions are the prime requirement to get a commodity eligible for drawback.**

(ii) The Drawback was introduced for the said products vide Notf. No 84/2010, effective from 20.09.2010, without any bar on availment of Drawback therein on the goods which were manufactured availing benefit of Rule 19(2) of the Central Excise Rules, 2002 in the said Notification. The respondents have filed the appeal against the said OIO before the Commissioner(Appeals), Customs, Kandla. The Commissioner(Appeals), vide said Order in Appeal, allowed the appeal contrary to the statutory provisions and settled legal positions as under:

As per Rule 5 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995:

> Rule 5: Determination of date from which the amount of rate of drawback is to come into force and the effective date for application of amount or rate of drawback.
>
> (1) The Central Government may specify the period upto which any amount or rate of drawback determined under rule 3 or revised under rule 4, as the case may be, shall be in force.

(2) where the amount or rate of drawback is allowed with retrospective effect, such amount or rate shall be allowed from such date as may be specified by the Central Government by notification in the Official Gazette which shall not be, earlier than the date of changes in the rates of duty on inputs [or tax on input services] used in the export goods.

Since, in the instant case it is categorically mentioned in the Notf. No. 84/2010 Cus (NT) that the same is effective from 20.09.10, question of giving it retrospective effect does not arise as further clarified by the office of the Drawback Commissioner.vide letter dated 04.01.12.

(iii) The Commissioner(Appeals) has grossly erred and brushed aside and ignored all the statutory provisions, settled legal positions and even ignored the clarification dated 04.01.2012 issued by the office of the Drawback Commissioner, CBEC, New Delhi. The Commissioner (Appeal) has *suo moto* allowed the appeal by misinterpreting the circular no. 35/2010 dated 17.09.2010 of the Drawback Commissioner, CBEC, New Delhi. Though, it was categorically mentioned in the said Circular as well as in the relevant notification No. 84/2010 Cus (NT) dated 17.09.2010 that the same is effective from 20.09.2010 even then the Commissioner(Appeals) *suo moto* misconceived the said circular and stated in the Order-In-appeal that the said Notification No 84/2010 is effective retrospectively. The Commissioner Appeal has also ignored the clarification issued by the Drawback Commissioner dated 04.01.2012 (copy enclosed as part of appeal memorandum) wherein it is categorically clarified as under:-

"Since the words of the notification no. 84/2010-Cus (NT) dated 07.09.2010 are clear and have prospective effect, the request for applying the same retrospectively does not arise".

The Constitutional Bench of the Hon'ble Apex Court in the case of Shyam Sundar Vs. Ram Kumar (Civil Appeal No. 4680/1993) has held that "we have quoted both the provisions in juxtaposition to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is a well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectively. The aforesaid principle has full play when vested rights are affected or influenced in the absence of any unequivocal expose; the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet that routinely or conventionally retrospective operation of law is not to be easily deduced. Hypothecation in that regard is ordinarily unwarranted."

Since, in this case it is categorically mentioned in the said Notf. No. 84/2010 and relevant circular no 35/2010 dated 17.09.10 that the same is effective from 20.09.2010, any question to make effective the same retrospectively does not arise.

(iv) On merit of the admissibility of Drawback also the Hon'ble Supreme Court in the case of Rubfila International Ltd. vs. Commissioner reported in 2008 (224) E.L.T. A133. (S.C.)] has upheld the decision of the Tribunal wherein it was held

"The Appellate Tribunal in its impugned order had held that even though All Industry Rate was fixed for a particular export product, applicable to all exporters who export the products, when there is evidence that inputs had not suffered any duty, mischief of Rule 3(1) (ii) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 was attracted and no drawback can be claimed.

The order of the Hon'ble Apex Court is applicable in this case also as no duty was suffered on any of the inputs/raw material used in the manufacture of export goods (DOC).

(v) The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chandigarh-1 Versus Mahaan Dairies reporter) in 2004 (166) E.L.T. 23 (S.C.) has held as under :-

"It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred."

(vi) The Hon'ble Delhi High Court in the case of M/s. Sesame Foods Pvt. Ltd. vs. UOI reported in 2010 (253) ELT 167 (Del.) denied the drawback and even questioned the applicability of all Industry Rate as under (Para 28):

"The very concept of a "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty, either excise or customs duty. If agricultural inputs that are in fact not imported, do not otherwise suffer incidence of excise duty, the question of fixing an AIR for such commodity cannot arise. The parity sought with HSD is plainly misconceived as HSD is a non-agricultural commodity which is manufactured and otherwise is amenable to levy of excise duties. This fundamental difference was perhaps lost sight of when the Respondents proceeded to fix AIR for sesame seeds. The only manner in which the petitioner could have got the benefit was to show that the sesame seeds were in fact imported. That explains why it repeatedly assured the Respondents that it would provide proof to this effect. And it failed to do so."

The said judgment of the High Court is squarely applicable in this case as no input has suffered any customs or central excise duty and therefore allowing of All India Rate of Drawback appears not allowable on the said product.

(vii) In a similar case of availment of drawback in the case of M/s. Sterling Agro Industries Ltd., the **Government of India in Order no. 214-215/10- Cus dtd.06.07.2910** has upheld the order of the Commissioner (Appeal) as under :-

"15. In view of above discussion and findings, government, finds that the applicant by way of procuring duty free inputs under rule 19(2) of Central Excise Rules, 2002 has contravened the clause (ii) of the Second Proviso to rule 3(1) of the Central Excise Drawback Rule, 1995 (Also Condition 7(f) of Notification No. 68/2007-Cus (NT) and Condition No. 8(f) of

Notification No. 103/2008-Cus. (NT) and therefore no drawback is admissible in this case. As such, Government finds no infirmity in the impugned orders and upholds the same.

The said Party had filed Writ Petition No 5894/2011 against the said order before the Division Bench of the Honorable M.P High Court Gwalior Bench which remanded the said order of the Govt. of India and held that the Drawback would be admissible under Rule 3(1) of the Drawback Rules if the benefit from payment of duty or rebate or Cenvat has been reversed. Thus, the stand of simultaneous availment of Drawback and Rule 19(2) cannot exist in light of the order of the High Court.

In the instant case the situation is worse as no duty (Customs or Central Excise) has been paid on any of the Inputs. Hence, no drawback will be admissible as per 2nd proviso to Rule 3 of the Drawback Rules as held by the Honorable Delhi High Court in the case of Seasame Foods and the Tribunal in the case of Rubfila International which was affirmed by the Honorable Supreme Court as cited above.

Thus, it is crystal clear that the Commissioner, Customs (Appeals), Kandla has grossly erred in the impugned order in appeal by ignoring all the above statutory provisions of Rule 5 of the DBK Rules above and settled legal position as well as the clarification of the Commissioner, Drawback dated 04.01.12. Hence, the OIA is liable to be set aside to meet the ends of justice.

(viii) The judgments quoted in para 7 of the said OIA viz Mars International reported at 2012 (286) ELT 146 (G.O.I) and Aarti Industries Ltd. reported at 2012 (285) ELT 461 (G.O.I) have been issued only after Notification No. 84/2010-Cus. (NT) dated 17.09.2010 which came in force only on 20.09.2010. The instant case had occurred before issuance of Notification No. 84/2010- Cus. (NT) dated 17.09.2010 (effective from 20.09.2012). Hence, such judgments will have no relevance to the instant case.

(ix) Besides these, the said fraudulent availment of drawback had also been pointed out by the C & AG and appeared in PAC Audit Report No. 15/2011-12 in Para 2.3.12

In view of the aforesaid submissions, applicant department pleaded that Order in Appeal No. 67 to 89/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla be set aside and Order in Original No. KDL/DBK/1303-1304/ADC/SS/2013-14 dated 09.10.2013, KDL/DBK/1419,1453 & 1454/ADC/SS/2013-14 dated 28.10.2013, KDL/DBK/1628 & 1598/ADC/SS/2013-14 dated 04.12.2013 & KDL/DBK/1631/ADC/SS/2013-14 dated 09.12.2013 passed by the Additional Commissioner of Customs, Kandla be upheld.

8. In response to the personal hearings granted in the matter vide letters dated 11.10.2019, 20.01.2020 and 18.01.2021, Shri Shikhar Chand Jain, Chartered Accountant & Insolvency Professional vide Letter dated 30.01.2021 submitted as under:-

*I write to you in capacity of the Liquidator in the matter of the Dhanlaxmi Solvex Private Limited (the "**Corporate Debtor**") which was ordered for liquidation by the Hon'ble National Company Law Tribunal, Ahmedabad (the "**NCLT**") on February 27, 2020 (Copy of the order enclosed).*

*It will be worth to mention that the Corporate Debtor was undergoing Corporate Insolvency Resolution Process (the "**CIRP**") since April 02, 2019 vide Hon'ble NCLT order dated April 02, 2019 (Copy of the order enclosed) and I was appointed as the Resolution Professional. The CIRP application filed by the Financial Creditor i.e., M/s Dena Bank (Now merged with bank of Baroda) Navlakha Branch, Indore (M.P.) against the Corporate Debtor under Section 7 of insolvency and Bankruptcy Code, 2016 (the "**IBC, 2016**") read with Rule 4 of Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016, was admitted by the Hon'ble NCLT.*

*On September 7, 2019, the Committee of Creditors (the "**CoC**") in its 4th meeting approved the liquidation for the Corporate Debtor and my appointment as the Liquidator. Later, in its dated February 27, 2020, Hon'ble NCLT ordered liquidation of the Corporate Debtor and appointed me as the liquidator.*

*As per the provisions of IBC, 2016, the Liquidator shall publicly announce for submission of claims by the Operational Creditors against the Corporate Debtor which is subject verification of claims by the Liquidator. In this regard, on May 7, 2020, a public announcement for submission of claims was made (Annexure 1) in the manner prescribed in the Regulation 12 of the Insolvency and Bankruptcy (liquidation Process) Regulations, 2016 (the "**Liquidation Regulations**").*

The Operational Creditor is expected to submit their claims in the manner prescribed in the Regulation 17 of the Liquidation Regulations.

This is for your kind information and record purposes.

9. Personal hearing in these cases was held on 04.02.2021 through video conferencing which was attended online on behalf of the applicant Department by Shri Prashant Kumar Mishra, Superintendent (DBK), Custom House Kandla who reiterated the grounds for revision.

10. Government has carefully gone through the relevant case records and perused the order-in-original and impugned order-in-appeal.

11. Government observes that the short issue in all these revision applications is whether duty drawback @ 1% of FOB value is admissible to the exporter respondent on the exports of DOC & SBM under Rule 3(1) of the Drawback Rules read with the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and 103/2008-Cus(NT) dated 29.08.2008.

12.1 It is observed that the detailed investigation has established that the *respondent manufacturer had procured duty free hexane by availing the facility* under Rule 19(2) of the CER, 2002 and used the same for the manufacture of DOC and sold the same to M/s Exim Rajathi India P. Ltd. during the period between 2006-07 to 2009-10. Government takes note that the second proviso to Rule 3 of the Drawback Rules at clause (ii) thereof bars drawback if goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid. Similarly condition no. 7(f) of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) and condition no. 8(f) of Notification No. 103/2008-Cus(NT) provide that the rates of drawback specified in the schedule shall not be applicable to export of a commodity or product if such product is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. Thus it is apparent that the All Industry Rates of Drawback specified under the schedule annexed to the notifications are not applicable to the exporter of such goods if the goods have been manufactured with inputs on which duty has not been paid and have been *procured by availing the facility under Rule 19(2) of the CER, 2002.*

12.2 The inference that can be drawn from the condition in the notifications and Rule 3 of the Drawback Rules is that duty should necessarily have been suffered on the inputs used in the export product. This is also the settled legal position. The duty element on the inputs is the primary ingredient for deciding the admissibility of drawback on exports. With regard to the inferences drawn by the Commissioner(Appeals) in the impugned order based on CBEC Circular No. 35/2010-Cus dated 17.09.2010, it is apparent from the text of the circular that the clarification regarding drawback in a situation where the raw materials have been procured without payment of central excise duty under Rule 19(2) of the CER, 2002 has been specifically stated to be admissible only with reference to Notification No. 84/2010-Cus(NT) dated 17.09.2010. It is pertinent to note that the portion where the issue has been raised in clause (d) of para 4(vi) of the circular, the notification mentioned is Notification No. 103/2008-Cus(NT) dated 29.08.2008. However, the notifications determining AIR rate of drawback for the preceding periods do not find mention in the portion where the reference has been answered and only Notification No. 84/2010-Cus(NT) dated 17.09.2010 finds mention. Therefore, it is obvious that the clarification issued by the Board applies only to Notification No. 84/2010-Cus(NT) dated 17.09.2010 which is applicable from 20.09.2010. The issue has been settled beyond doubt by the clarification issued by the Office of the Drawback Commissioner vide his letter F.

No. 609/292/2008-DBK dated 04.01.2012 to the Federation of Indian Export Organization.

13. Government takes note of the judgments of the courts on the issue. In the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)], the Apex court upheld the principle that when there is evidence that the inputs had not suffered duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed. So also, in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)], their Lordships held that "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty and if goods like agricultural inputs are not imported and do not suffer incidence of excise duty, the question of fixing AIR for such commodities cannot arise. In the case of Suraj Impex (India) Pvt. Ltd. vs. Secretary, Union of India[2017(347)ELT 252(M.P.)], the Hon'ble High Court of Madhya Pradesh held that simultaneous availment of drawback as well as Rule 19(2) was introduced by omission of clause 8(f) of the erstwhile Notification No. 103/2008 and the introduction of new clause 9(b) in Notification No. 84/2010 which was made effective from 20.09.2010 and explained the same in Circular No. 35/2010. The Notification No. 84/2010 was effective from 20.09.2010 and the same cannot be given retrospective effect in the light of the aforementioned facts.

14. Government observes that in the case of Anandeya Zinc Oxides Pvt. Ltd.[2016(337)ELT 354(Bom.)], the Hon'ble Bombay High Court had occasion to examine the argument put forth by that manufacturer that drawback of customs portion could be availed alongwith facility for procurement of inputs under Rule 19(2) of the CER, 2002. The Hon'ble Bombay High Court found that the view taken by the authorities below that the petitioners in that case could not avail customs drawback under Notification No. 26/2003-Cus(NT) dated 01.04.2003 could not be faulted. It was further held that there was no scope for bifurcating drawback towards customs and excise allocation. Their Lordships noted that the notification clearly provides an exclusion to the applicability of the entire notification in specific situations which have been specified therein; one of which was - goods manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. The Hon'ble High Court opined that nothing could be read into such notification and that it was well settled that taxation and fiscal statutes have to be strictly construed. Their Lordships firmly held that the Courts cannot read

words into such provisos. The judgments of the Apex Court and the High Courts are binding precedents.

15. The case laws which have been relied upon by the respondents do not consider these judgments and in some cases they pertain to the period after 20.09.2010. In view of the foregoing the respondent's argument that "*since entire 1% drawback was only customs component, it is irrelevant that Central Excise duty was not allegedly paid on the Hexane*" is not legally tenable. Government notes that the findings In Re : Aarti Industries Ltd.[2012(285)ELT461(GOI)] and GOI Order No.36-38/2016-CX dated 22.02.2016 in M/s Blackstone Overseas Pvt. Ltd.. are based on the interpretation of the amplitude of Notification No. 84/2010-Cus(NT) dated 17.09.2010 which has been explained in the CBEC Circular No. 35/2010-Cus dated 17.09.2010. These findings are misplaced and erroneous. Be that as it may, these order are not the final position of law on this issue in so far as decisions in the judicial realm are concerned and therefore are not a binding precedent. Government further observes that the name of the exporter M/s Exim Rajathi India P. Ltd. does not figure in the list of appellants against *OIO No. KDL/DBK/1628/ADC/SS/2013-14 dated 04/09.12.2013*. The noticee exporter has not filed appeal against the OIO No. KDL/DBK/1628/ADC/SS/2013-14 dated 04/09.12.2013. The said exporter therefore has clearly admitted to their role in wrongly claiming drawback by resort to mis-declaration and suppression of facts in connivance with the respondent manufacturers. As held by the courts from time to time, admitted facts need not be proved. Therefore, Government concludes that AIR drawback is not admissible to the exporter in this case and the drawback sanctioned and paid to them is liable to be recovered alongwith interest.

16.1 Government proceeds to consider the case for imposition of penalty on the manufacturer (respondent), who has supplied DOC to M/s Exim Rajathi India Pvt. Ltd., (exporter) in this case. M/s Dhanlaxmi Solvex Pvt. Ltd. (respondent) have not issued ARE-2 for removal of the DOC manufactured out of the duty free procured hexane by availing benefit under Rule 19(2) of CER 2002, and thereby abetted the Exporter in claiming inadmissible drawback but have only issued export invoices while clearing consignments of goods. The non-issue of ARE-2 was clearly not a mistake as borne out by the fact that the DGCEI has booked cases against several manufacturers and exporters who had adopted the same practice of not issuing ARE-2's. Besides the manufacturers/exporter involved in this case, there are other cases booked by the DGCEI which involve identical

facts and involve several other manufacturers/exporters. Such failure in not issuing the ARE-2's cannot be passed off as a coincidence. Remarkably in all the cases booked by the DGCEI, the export goods were cleared from Kandla Port and Bedi Port in Gujarat and the same were manufactured by manufacturers located in Madhya Pradesh. One would have to be extremely naive to be convinced that such repetitive failures in issuing ARE-2's and misdeclaration in Appendix-I/III's are legitimate coincidences. It cannot be lost sight of that in matters of revenue, preponderance of probability is the standard for evaluating the existence of a fact and not proof beyond doubt.

16.2 Government places reliance upon the judgment of the Hon'ble Madras High Court in the case of Lawn Textile Mills Pvt. Ltd. vs. CESTAT, Chennai[2018(362)ELT 559(Mad)] wherein it was held that clandestine removal with intention to evade payment of duty is always done in a secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in such cases where secrecy is involved, there would be cases where direct documentary evidence is not available. However, if the Department is able to establish a case on the basis of seized records, then the allegation of clandestine removal must be held to be proved. Adopting the ratio of the said judgment to the facts of the present case, the records have established that the exporter has availed drawback on export goods in spite of them having been manufactured using inputs which had been procured without payment of duty under Rule 19(2) of the CER, 2002. The virtually identical circumstances of ARE-2's not having been issued by the manufacturer, M/s Dhanlaxmi Solvex Pvt. Ltd. (respondent) in the present case and by several manufacturers in all the cases booked by the DGCEI are by themselves corroboratory evidence of complicity with the exporters. It cannot be mere coincidence that the outcome of this so called failure on the part of the manufacturers in all these cases has by default resulted in the exporters opportunely obtaining drawback which would otherwise have been rejected by the customs authorities.

16.3 Government therefore infers that the procedure adopted by the manufacturer (respondent) in not issuing ARE-2 was meant for the exporter to claim ignorance of the fact that inputs had been procured by availing the facility of Rule 19(2) of the CER, 2002 and claim drawback. The fact that this practice was adopted by several manufacturers/exporters is a pointer to the adoption of this modus to enable exporters to claim drawback where the manufacturers had availed the facility under Rule 19(2) of the CER, 2002 to procure inputs. To

name a few Government has come across identical issues in Revision Applications 1. 380/75,85,65,76,64/DBK/2014 M/s Oswal Salt & Chemical Industries & others (GOI Order No. 145-149/2020 dtd. 27.08.2020, 2. 380/66,74,80,83/DBK/2014 in Re: M/s Laxmi Ventures (I) Ltd. & others (GOI Order No.162-165/2020 dtd.01.09.2020), 3. 380/70,79,84/DBK/2014 in Re:M/s Rainbow Agri Industries Ltd. and others (GOI Order No. 166-168/2020 dtd. 01.09.2020), 4. 380/43,45,50,51,54, 55/DBK/2014 in Re:M/s Ruchi Soya Industries Ltd. Indore (MP) and others (GOI Order No.190-195/2020 dtd.11.09.2020) and 5. 380/61-63/DBK/2013 RA- Re :- M/s Adani Enterprises Ltd. & Others (GOI Order No.206-208/2020 dated 15.09.2020).

16.4 Government is therefore of the view that the manufacturer, viz. M/s Dhanlaxmi Solvex Pvt. Ltd. (respondent) have rendered themselves liable to be penalized. In Re: Rama Phosphate Ltd.[2014(313)ELT 838(GOI)], the Government had arrived at the conclusion that the manufacturer could not be penalized as there was no documentary evidence. The Government finds that the very fact that all the manufacturers involved in these cases had not issued ARE-2 and the practice has been commonly adopted by all of them evidences the fact that there was some sort of an arrangement between the manufacturers and the exporters to enable the exporter to avail drawback. Government therefore holds that the respondent manufacturer is liable to be penalized.

17. Government now proceeds to discuss the statutory provisions under which penalties have been imposed. In this case, the tone and tenor of the actions of the exporter and the manufacturer reveal that it was a well thought out ruse to avail drawback. There were several manufacturers and exporters against whom cases were booked by the DGCEI involving an identical modus. In all these cases raw materials had been procured without payment of duty under Rule 19(2) of the CER, 2002, ARE-2 had not been issued and thereafter drawback was claimed. The exporter had suppressed the facts that the Export goods (DOC) has been manufactured availing the benefit of Rule 19(2) of CER, 2002 from the department, also made a false declaration in the Drawback Declaration (Appendix-I) stating that "the Export goods have not been manufactured availing facility of Rule 18/Rule 19 of the Central Excise Rules, 2002". It is implausible to even visualize that there were errors or mistakes by oversight in all these declarations. As such the exporter had rendered the goods liable for confiscation by misdeclaring that they had not availed the facility under Rule 19 of the CER, 2002 and by availing drawback on the exports.

However, since the goods had been exported, the show cause notice does not propose confiscation. The fact that there is no proposal to confiscate the goods or that the goods were not available for confiscation would not prevent penalty from being imposed on them. In this regard, Government places reliance upon the judgment in the case of Dadha Pharma Pvt. Ltd. vs. Secretary to the Government of India [2000(126)ELT 535(Mad)] which has interpreted the words "liable to confiscation" occurring in Section 112 of the Customs Act, 1962 and concluded that the power to adjudicate upon for imposition of penalty springs from the liability to confiscate and not from actual confiscation. The same analogy would apply to the provisions of Section 114 of the Customs Act, 1962. That is to say, if the goods were liable to confiscation by virtue of any action/inaction on the part of the exporter of the goods, the exporter would be liable to be penalized. Even if the goods are not available for confiscation, the penal provisions would still be invokable. There were very well thought out motives behind the actions of the exporter and the respondent. There was common intention behind the false/incorrect declarations to avail drawback which would otherwise not be available. Hence, penalty under Section 114 was correctly imposable on them.

18. Government therefore modifies the impugned Order in Appeal No. 67 to 89/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla by restoring the Order in Original No. KDL/DBK/1628/ADC/SS/2013-14 dated 04/09.12.2013 passed by the Additional Commissioner (DBK), Custom House, Kandla. The Department may also take necessary action to protect revenue in terms of the Order dated 27.02.2020 issued by the Hon'ble NCLT.

19. The revision application No. 380/82/DBK/14-RA filed by the Commissioner of Customs, Custom House, Kandla, is allowed in the above terms.

17/12/21

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

ORDER No.184/2021-CX (WZ) /ASRA/Mumbai DATED 17.08.2021

To,

Principal Commissioner of Customs,
Kandla Custom House, Near Balaji Temple,
Kandla-370 210.

Copy to:

1. M/s Dhanlaxmi Solvex Pvt. Ltd.,
   201, Bansi Plaza, 581-MG Road, Indore
2. The Commissioner of Customs, Ahmedabad Appeals, 7th Floor, Mrudul Tower, off Ashram Road, Near Times of India, Navrangpura, Ahmedabad-380 009
3. Assistant Commissioner (DBK), Custom House, Kandla, New Customs Building, Near Balaji Temple, Kandla 370 210
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file