REGISTERED SPEED POST AD

सत्यमेव जयते

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. 380/51/DBK/13-RA
F. No. 380/55/DBK/13-RA /1590
F. No. 380/45/DBK/13-RA
F. No. 380/50/DBK/13-RA
F. No. 380/54/DBK/13-RA
F. No. 380/43/DBK/13-RA

Date of Issue: 30.09.2020

ORDER NO. 190-195/2020-CUS (WZ) /ASRA/MUMBAI DATED 11.09.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT.SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant : Commissioner of Customs
Sarda House, Opp. Panchwati,
Bedi Bunder Road,
Jamnagar 361 002

Respondent : M/s Ruchi Soya Industries Ltd.
301, Mahakosh House,
7/5, South Tukoganj,
Nath Mandir Road, Indore(M.P.)
& Five Others

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 01 to 06/Commr(A)/JMN/2013 dated 17.01.2013 passed by the Commissioner of Customs(Appeals), Jamnagar.

ORDER

These revision applications have been filed by the Commissioner of Customs, Jamnagar(hereinafter referred to as "the applicant" or "the Department") against OIA No. 01 to 06/Commr(A)/JMN/2013 dated 17.01.2013 passed by the Commissioner of Customs(Appeals), Jamnagar in the case of M/s Ruchi Soya Industries Ltd.(hereinafter referred to as "the respondent no. 1") and four others.

2.1 M/s Ruchi Soya Industries Ltd., 301, Mahakosh House, 7/5, South Tukoganj, Nath Mandir Road, Indore(M.P.)(hereinafter referred to as "respondent no. 1") are engaged in the export of agriculture products including Soya Bean De Oiled Cake(hereinafter referred to as DOC) in the year 2007-08 to 31.10.2009 falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975. Shri Nitin Virkar(hereinafter referred to as "respondent no. 2") was the DGM(Commercial) of respondent no. 1 firm at the relevant time. All the activities of the respondent no. 1 relating to export and availment of duty drawback had taken place as per his directions. The said respondent no. 1 had exported Soya De Oiled Cake from Bedi Port falling under the jurisdiction of the Commissioner of Customs, Jamnagar under claim of drawback.

2.2 M/s Vippy Industries Ltd., 28-30, Industrial Area, Dewas(M.P.) – 455 001(hereinafter referred to as "respondent no. 3"), M/s Rama Phosphate Ltd., 100-Chetak Centre Annex, 12/2, R.N.T. Marg, Indore(M.P.)(hereinafter referred to as "respondent no. 4") and M/s Krishna Oil and Proteins Pvt. Ltd.(hereinafter referred to as "respondent no. 5") are manufacturers engaged in the manufacture of soya oil and soya DOC by solvent extraction process using hexane as solvent in their factories and had sold the said DOC to the respondent no. 1 which was exported by respondent no. 1 by availing the facility of duty drawback. M/s Rainbow Agri Industries Ltd., 52, Free Press House, 215, Nariman Point, Mumbai(hereinafter referred to as "respondent no. 6") are traders who had

purchased the DOC from respondent no. 4 and sold the same to respondent no. 1 who subsequently exported the same availing the facility of duty drawback.

2.3 An intelligence gathered by the Directorate General of Central Excise Intelligence(DGCEI) , Regional Unit, Indore indicated that the respondent no. 1 had exported the DOC falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975 from Bedi Port by availing the benefit under Duty Drawback. The said DOC was purchased by them from the manufacturers/trader where the manufacturer had manufactured the same by availing the benefit under Rule 19(2) of the CER, 2002 by procuring hexane without payment of central excise duty by following the procedure as prescribed under Rule 19(2) of the CER, 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 respondent no. 1 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.

2.4 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.

3.1 On the basis of the details, partywise chart submitted by the respondent no. 1 and the investigation carried out at the end of the manufacturers and the

trader, the documents of duty free procurement of hexane by availing the benefit under Rule 19(2) of the Central Excise Rules, 2002 resumed from them; viz. hexane procurement and consumption registers, Appendix-46 and invoices of petroleum companies M/s HPCL, M/s BPCL, M/s IOCL etc. and the statements of authorised persons of the merchant exporter, the manufacturers, the trader and the legal position mentioned above, it appeared that the respondent no. 1 had wrongly claimed and availed duty drawback amounting to Rs. 20,86,269/- from Bedi Port on the exported goods(DOC) purchased by them from the manufacturers who had manufactured the same under bond by procuring hexane without payment of duty payable thereon and by availing the benefit under Rule 19(2) of the CER, 2002. It therefore appeared that the respondent no. 1 was not entitled to duty drawback on the exports of such DOC in view of the provisions of Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995(Drawback Rules) and condition 7(f) of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and condition no. 8(f) of Notification No. 103/2008-Cus(NT) dated 29.08.2008 and therefore the said amount of duty drawback paid to them appeared to be recoverable from them under Rule 16 of the Drawback Rules read with Section 75 and Section 28(1) of the Customs Act, 1962. It also appeared that the said respondent no. 1 had wrongly claimed and irregularly availed the said amount of duty drawback by suppression of facts and willful mis-declaration as they had not disclosed the facts of manufacturing the DOC by availing the benefit of Rule 19(2) of the CER, 2002 in the Appendix-III submitted with the shipping bills for claim of drawback. The respondent no. 1 was also liable to pay interest at the applicable rate under Section 28AB of the Customs Act, 1962.

3.2 It appeared that these acts of omission and commission on the part of respondent no. 1, respondent no. 3, respondent no. 4, respondent no. 5, the respondent no. 6 and respondent no. 2 – Shri Nitin Virkar, DGM(Commercial)

of respondent no. 1 who looked after all the export related work including the availment of drawback at the relevant period had knowingly and intentionally got filed incorrect declaration in Appendix-III of the shipping bills that DOC had been manufactured without availing the benefit of Rule 19(2) of the CER, 2002 thereby rendering themselves liable to penalty under Section 114 of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962.

3.3 The manufacturer of DOC; respondent no. 3, respondent no. 4, respondent no. 5 and the respondent no. 6 had in connivance with the respondent no. 1 deliberately not issued ARE-2 for removal of the said DOC and had by abetting/omission rendered the DOC liable for confiscation under Section 113(i) and thereby rendered themselves liable to penalty under Section 114(iii) of the Customs Act, 1962. The respondent no. 1 was called upon to show cause why penalty should not be imposed upon them under Section 114 and Section 114AA of the Customs Act, 1962. The respondent no. 2 had also been asked to show cause why penalty should not be imposed on them under Section 114(iii) & Section 114AA of the Customs Act, 1962 for having knowingly and intentionally filed declarations in Appendix-III of shipping bills that DOC had been manufactured without availing the benefit of Rule 19(2) of the CER, 2002. The respondents were issued SCN on the above grounds.

4. After careful consideration of the evidences adduced by the investigation and relying on various case laws, the Additional Commissioner of Customs, Jamnagar vide OIO No. 05/Addl.Commr./2012 dated 30.03.2012 disallowed the drawback claims amounting to Rs. 20,86,269/- and ordered recovery of the amount of duty drawback erroneously granted, ordered recovery of interest on the amount of duty drawback erroneously sanctioned, appropriated the amount of Rs. 26,28,853/- paid by them against recovery of drawback amount of Rs. 20,86,269/- and interest thereon, imposed penalty of Rs. 35,00,000/- on respondent no. 1 under Section 114(iii) of the Customs Act, 1962, imposed

penalty of Rs. 45,00,000/- on respondent no. 1 under Section 114AA of the Customs Act, 1962, imposed penalty of Rs. 5,00,000/- on respondent no. 2 under Section 114(iii) of the Customs Act, 1962, imposed penalty of Rs. 8,00,000/- on respondent no. 2 under Section 114AA of the Customs Act, 1962, imposed penalty of Rs. 5,00,000/- on respondent no. 3, imposed penalty of Rs. 3,00,000/- on respondent no. 4, imposed penalty of Rs. 50,000/- on respondent no. 5 and imposed penalty of Rs. 1,00,000/- on respondent no. 6.

5.1 Aggrieved by the OIO, the respondents filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) examined Notification No. 81/2006-Cus(NT) dated 13.07.2006, Notification No. 68/2007-Cus(NT) dated 16.07.2007 & Notification No. 103/2008-Cus(NT) dated 29.08.2008 and clause 7(f)/8(f) of these notifications. He found that the conditions of these notifications were identical in nature and had been discussed in the Board's Circular No. 35/2010-Cus dated 17.09.2010. The Commissioner(Appeals) observed that the circular clarifies that customs component of AIR drawback would be available even if the rebate of the central excise duty paid on raw materials used in the manufacture of export goods had been taken in terms of Rule 18 of the CER, 2002 or if such raw materials had been procured without payment of central excise duty under Rule 19(2) of the CER, 2002. He averred that the circular clarifying the existing provisions of the notification would equally apply to notifications issued earlier if the provisions are identical.

5.2 The Commissioner(Appeals) found that the issue was no longer res integra and placed reliance upon the orders of the Government of India in the case of In Re : Mars International[2012(286)ELT 146(GOI)] and In Re : Aarti Industries Ltd.[2012(285)ELT 461(GOI)]. He averred that although these cases dealt with rebate of central excise duty, the Government had considered various instructions of the Board also pertaining to drawback and decided that there would not be any double benefit by allowing rebate of central excise duty when

drawback of customs portion was availed. The Government of India had also taken the support of CBEC Circular No. 35/2010 to conclude that even in cases prior to issue of Notification No. 84/2010-Cus, the ratio of the Circular has to be applied. He inferred that this meant that when the exporter availed rebate of central excise duty and claims drawback of customs portion, it would not amount to double benefit and therefore drawback of customs portion can be allowed. He also observed that the Commissioner(Appeals), Jamnagar had decided a similar matter in the case of Pradip Overseas vide OIA No. 79 to 81/Commr(A)/JMN/2012 dated 14.09.2012.

5.3 The Commissioner(Appeals) then examined the provisions of the Drawback Rules, 1995 and found that the first proviso to Rule 3 was inserted vide Notification No. 80/2006-Cus(NT) dated 13.07.2006 to ensure that the exporter should not avail double benefit and that this provision also makes it clear that where any amount of tax or duty which has been rebated or refunded, the drawback should be reduced to that extent. He therefore proceeded to hold that he did not find any merit in the order of the adjudicating authority, allowed the drawback and set aside the penalties imposed.

6. The Commissioner of Customs, Jamnagar found that the OIA No. 01 to 06/Commr(A)/JMN/2013 dated 17.01.2013 was not legal and proper and therefore directed the Deputy Commissioner to file revision application on the following grounds :

(i) The goods exported by the respondent no. 1 were manufactured by availing facility under Rule 19(2) of the CER, 2002. As per the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, Notification No. 68/2007-Cus(NT) dated 16.07.2007 and Notification No. 103/2008-Cus(NT) dated 29.08.2008 which governed drawback claims during the period 2007-08 to 31.10.2009, drawback claims were

not admissible if the goods exported had been manufactured by availing the facility under Rule 19(2) of the CER, 2002.

(ii) The Commissioner(Appeals) had referred the provisions of Notification No. 84/2010-Cus(NT) dated 17.09.2010 read with CBEC Circular No. 35/2010-Cus dated 17.09.2010 and wrongly applied the inferences ensuing from the said notification and circular retrospectively to decide the matter in favour of the respondents.

(iii) The Commissioner(Appeals) has failed to take into consideration the clarification issued by the Drawback Unit vide letter F. No. 609/292/2008-DBK dated 04.01.2012.

(iv) Reliance was placed upon the decision In Re : Sterling Agro[2011(269)ELT 113(GOI)], Shyam Sundar vs. Ram Kumar[Supreme Court Civil Appeal No. 4680/1993], Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)], Commissioner of Central Excise, Chandigarh-I vs. Mahaan Dairies[2004(166)ELT 23(SC)] & Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)].

(v) With regard to the proposal for imposition of penalty, it was submitted that the adjudicating authority had clearly established the malafide intentions of the respondent no. 1, respondent no. 2, respondent no. 3, respondent no. 4, respondent no. 5 and respondent no. 6 in the findings recorded in the OIO and accordingly all six were liable to penalty.

7. The respondent no. 1 and respondent no. 2 submitted reply/cross objection to the revision application filed by the Department vide their letter dated 22.06.2013. They stated that they had claimed drawback only in respect of the customs component. They further contended that since Circular No. 35/2010-Cus dated 17.09.2010 was a beneficial circular it would be applicable retrospectively on the ground that identical conditions were there in notifications

issued earlier to Notification No. 84/2010-Cus(NT) dated 17.09.2010. They placed reliance upon the decisions In Re : Aarti Industries[2012(285)ELT 461(GOI)], In Re : Mars International[2012(286)ELT 146(GOI)]. It was averred that since respondent no. 1 had claimed drawback only in respect of customs portion of 1% drawback, even if there was any rebate claim for excise portion, it would not amount to double benefit. The respondents submitted that the clarification vide letter dated 04.01.2012 had no legal sanctity and that the letter would have no force of law and cannot overrule circulars issued by the Board and judicial pronouncements. They further contended that copy of the letter dated 04.01.2012 had not been supplied to them and requested that it may be given to them. The respondent reserved their right to make further submissions in this regard after supply of copy of the said letter. The respondents further stated that there was no act or omission on their part warranting imposition of penalty and that no evidence whatsoever had been brought on record to justify the imposition of penalties. The respondent no. 1 and respondent no. 2 again filed written submissions vide letter dated 02.04.2016 and reiterated their submissions. They submitted that the ratio of decision In Re : Rama Phosphate Ltd.[2014(313)ELT 838(GOI)] was contrary to law as a beneficial circular is to be applied retrospectively. They further stated that the SCN issued to them does not place reliance upon the letter of Drawback Cell dated 04.01.2012. They averred that the SCN dated 30.12.2010 issued to them was time barred as the period involved was 2007-08 to 31.10.2009. The respondents pointed out that the para 9-12 of the OIO dated 30.03.2012 record nothing incriminating in the statements of the manufacturers/traders and to incriminate them. Moreover, para 42 of the OIO merely notes that the respondents did not follow the ARE-2 procedure while clearing the goods which was mandatory as per Rule 19(2) of the CER, 2002. Therefore, there was no cause or reason to impose penalty on them. Moreover, the drawback amount alongwith interest had already been deposited with the Department.

8. The respondent no. 1 and respondent no. 2 were granted personal hearing on 24.09.2018. Shri Abhijit Punekar, Manager appeared on behalf of the respondents and Shri H. K. Meshram, AC, Customs Jamnagar appeared for the Department. The respondent reiterated their submissions in response to the revision application. The Departmental Officer reiterated the grounds for revision. On change in Revisionary Authority, the respondents as well as the Department were again granted personal hearing. None appeared for the respondent. Shri Shekhar Chavan, Assistant Commissioner appeared on behalf of the Department and reiterated the ground of revision application.

9. The respondent no. 3 was granted personal hearing on 04.12.2019 and 11.12.2019. However, they failed to appear for personal hearing on the said dates. Respondent no. 4 and respondent no. 5 were granted personal hearing on 01.10.2019. Shri Ashutosh Upadhyay, Advocate appeared on their behalf. They placed reliance on the decision in their own case In Re : Rama Phosphate Ltd.[2014(313)ELT 838(GOI)] wherein penalty had been waived. He submitted that the facts of the said case were identical to those involved under the present proceedings. Respondent no. 6 was granted a personal hearing on 04.10.2019. Shri Ashutosh Upadhyay, Advocate appeared on their behalf. He stated that they were merely traders. He placed reliance upon the decision In Re : Gokul Auto Pvt. Ltd.[2018(363)ELT 817(GOI)] to contend that where the exporter has claimed duty drawback in respect of customs duty, they would be eligible for refund of excise duty. They also placed reliance upon the decision In Re : Rama Phosphate Ltd.[2014(313)ELT 838(GOI)] to canvas their case that they cannot be penalized as they had not misdeclared in any document and that the allegation of connivance with merchant manufacturer was without any documentary evidence.

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

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 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.

10.2 It is observed that the detailed investigation has established that respondent no. 3, respondent no. 4, respondent no. 5 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 respondent no. 1 during 2006-07, 2007-08. Respondent no. 6 had purchased DOC manufactured in such manner from respondent no. 4. 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.

11. Government finds that the respondents have not denied the fact of duty free procurement of inputs and their use in the manufacture of DOC by the manufacturers and their export under claim of duty drawback. 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 Organisation.

12.1 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. Since 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.

12.2 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. They 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. The case laws which have been relied upon by the respondents do not consider these judgments and in some cases pertain to the period after

20.09.2010. Therefore, Government concludes that AIR drawback is not admissible to the respondent no. 1 and the drawback sanctioned and paid to the said respondent is liable to be recovered alongwith interest.

13.1 The respondents have argued regarding the fact that the SCN is hit by limitation in view of it having been issued beyond one year of the offence. Government observes that the SCN has been issued after the DGCEI carried out a laborious investigation which unraveled the willful mis-statement and suppression of facts on their part to falsely obtain drawback which was not due to them. The fact that there were several other merchant exporters and manufacturers who had indulged in a similar method of not issuing ARE-2 and misdeclaring in the Appendix-III that the goods have been manufactured without following the procedure under Rule 19(2) of the CER, 2002 also pointed to machination on a larger scale and dispels their assertions about having acted bonafidely. In such cases, the Department is empowered to issue SCN within the extended period of five years in terms of proviso to Section 28(1) of the Customs Act, 1962 read with Rule 16 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 read with Section 75 of the Customs Act, 1962 and hence the SCN is not hit by limitation.

13.2 Government finds that the categorical stipulation of the respective notifications allowing drawback is that the rates of drawback shall not be applicable to the export of a commodity or product if it is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. It does not leave any scope for interpretation of the degrees/percentages in which materials could be used in the manufacture. Once any material procured under sub-rule (2) of Rule 19 of the CER, 2002 is used for manufacture, the manufacturer is disentitled from the benefit of drawback. There is no room left for interpretation.

14.1 Government proceeds to consider the case for imposition of penalty on the exporter and the manufacturers who have supplied DOC to the exporter. The

respondent no. 3, respondent no. 4 and respondent no. 5 have not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing the goods. The non-issue of ARE-2 was not a bonafide mistake as borne out by the 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/exporters/trader involved in this case, there are other cases booked by the DGCEI which involve identical facts and involve several other manufacturers/exporters. Such synchronized failure in not issuing the ARE-2's cannot be passed off as a coincidence. It is therefore apparent that the procedure adopted by the manufacturers was ideal 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 across Commissionerates 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. Government is therefore of the view that the respondent no. 1 as well as the manufacturer respondent no. 3, respondent no. 4, respondent no. 5 and respondent no. 6 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 manufacturers, the trader and the exporters are liable to be penalized.

14.2 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 manufacturers/trader 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 respondent no. 1 had made a false declaration in the Appendix-III stating that goods had not been manufactured by availing the procedure under Rule 18/Rule 19 of the CER, 2002. It is implausible to even visualize that there were errors or mistakes by oversight in all these declarations. As such the respondents 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 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 respondents. There was common intention behind the false/incorrect declarations to avail drawback which would otherwise not be available. Hence, penalty under Section 114 and Section 114AA were correctly imposable on the respondents.

15. Government therefore sets aside the impugned OIA No. 01 to 06/Commr(A)/JMN/2013 dated 17.01.2013 and restores the OIO No. 05/Addl. Commr./2012 dated 30.03.2012 passed by the Additional Commissioner of Customs(Prev), Jamnagar. The revision applications filed by the Department are allowed.

16. So ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No. 190-195 /2020-CX (WZ) /ASRA/Mumbai DATED 11.09.2020.

To,

1. M/s Ruchi Soya Industries Ltd.
   301, Mahakosh House,
   7/5, South Tukoganj,
   Nath Mandir Road,
   Indore(M.P.)
2. Shri Nitin Virkar,
   DGM(Commercial) of M/s Ruchi Soya Industries Ltd.,
   301, Mahakosh House,
   7/5, South Tukoganj,
   Nath Mandir Road,
   Indore(M.P.)
3. M/s Vippy Industries Ltd.
   28-30, Industrial Area,
   Dewas(M.P.) – 455 001
4. M/s Rama Phosphate Ltd.
   100, Chetak Centre Annex,
   12/2, R.N.T. Marg,
   Indore(M.P.)
5. M/s Krishna Oil and Proteins Pvt. Ltd.
   332, Gram – Jawasia Kumhar,
   Near Nazgiri, Ujjain

6. M/s Rainbow Agri Inds. Ltd.
   52, Free Press House,
   215, Nariman Point,
   Mumbai

Copy to:

1. The Commissioner of Customs, Jamnagar
2. The Commissioner of Customs(Appeals), Jamnagar
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy