REGISTERED SPEED POST AD

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. 380/70/DBK/13-RA/5939 Date of Issue: 16.10.2020

ORDER NO.193/2020-CUS (WZ) /ASRA/MUMBAI DATED 15.09.2020 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
Custom House,
Near Balaji Temple,
Kandla

Respondent : M/s Ruchi Soya Industries Ltd.
614, Tulsiani Chambers,
Nariman Point,
Mumbai 400 021

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 244/2013/CUS/Commr(A)/KDL dated 25.03.2013 passed by the Commissioner of Customs(Appeals), Kandla.

ORDER

These revision applications have been filed by the Commissioner of Customs, Kandla(hereinafter referred to as "the applicant" or "the Department") against OIA No. 244/2013/CUS/Commr(A)/KDL dated 25.03.2013 passed by the Commissioner of Customs(Appeals), Kandla in the case of M/s Ruchi Soya Industries Ltd.(hereinafter referred to as "the respondent").

2.1 M/s Ruchi Soya Industries Ltd., 614, Tulsiani Chambers, Nariman Point, Mumbai 400 021(hereinafter referred to as "respondent") had filed 10(ten) shipping bills for drawback claim @ 1% of FOB value as per for export of "Soyabean Meal" as per All Industry Rate of Drawback prescribed under Notification No. 68/2007-Cus(NT) dated 16.07.2007 superseded by Notification No. 103/2008-Cus(NT) dated 29.08.2008. The said exported goods had been purchased by them from the manufacturer and also manufactured by them, availing the benefit of Rule 19(2) of the Central Excise Rules, 2002 by procuring hexane without payment of central excise duty by following the procedure prescribed under Rule 19(2) of the CER, 2002

2.2 The adjudicating authority had in the light of condition no. 7(f)/8(f) of Notification No. 81/2006-Cus(NT), Notification No. 68/2007-Cus(NT) and Notification No. 103/2008-Cus(NT) and Rule 3(1) of the Drawback Rules, 1995 rejected the drawback claim of the respondent in respect of 3(three) shipping bills vide OIO No. KDL/AC/MG/626/DBK/2011 dated 28/31.03.2012.

3.1 Aggrieved by the OIO dated 28/31.03.2012, the respondent preferred appeal before the Commissioner(Appeals). Commissioner(Appeals) on taking up the appeal for decision examined the condition 7(f) and 8(f) of Notification No. 81/2006-Cus(NT) dated 13.07.2006 and Notification No. 103/2008-Cus(NT) dated 29.08.2008 respectively. He found that both the conditions of both these notifications were identical in nature. He then averred that the interpretation of this clause of these notifications had been discussed and clarified in Board Circular No. 35/2010-Cus dated 17.09.2010 holding that the customs

component of AIR drawback would be available even if the rebate of central excise duty paid on raw materials used in the manufacture of export goods has been taken in terms of Rule 18 of the CER, 2002 or if such raw materials were procured without payment of central excise duty under Rule 19(2) of the CER, 2002. The Commissioner(Appeals) then referred the decisions In Re : Mars International[2012(286)ELT 146(GOI)] and In Re : Aarti Industries Ltd.[2012(285)ELT 461(GOI)] and contended that they had dealt with similar issue regarding simultaneous availment of drawback of duty under Section 75 of the Customs Act, 1962(AIR drawback) and rebate of central excise duty paid on raw materials used in the manufacture of export goods 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 and held that allowing rebate of duty paid on finished exported goods and drawback of customs portion would not amount to double benefit.

3.2 The Commissioner(Appeals) then proceeded to examine Rule 3 of the Drawback Rules and inferred that the exporter should not avail double benefit and that it makes it clear that if any amount of tax or duty is rebated or refunded, the drawback amount should be reduced to that extent. He therefore inferred that drawback amount of customs portion should not be completely obliterated just because an exporter had availed rebate claim of excise portion of drawback amount. The Commissioner(Appeals) then referred condition 6 of Notification No. 103/2008-Cus(NT) which states that when the rate of drawback indicated in both columns is the same, it would mean that it pertains only to the customs component and would be available irrespective of whether the exporter has availed CENVAT or not. It was therefore averred that customs component of AIR drawback would be available 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 the CER, 2002 or if such raw materials were procured without payment of central excise duty under Rule 19(2) of the CER, 2002. The Commissioner(Appeals) observed that in the present case the amount of drawback pertaining to the shipping bills had been claimed @ 1% on FOB value

as customs component and the rate indicated is the same in both columns of Notification No. 103/2008-Cus(NT) dated 29.08.2008 and therefore it pertains to only customs component and is available irrespective of whether the exporter had availed CENVAT or not. The Commissioner(Appeals) did not find any merit in the order passed by the adjudicating authority and held that the respondent had correctly claimed drawback. He therefore passed OIA No. 244/2013/CUS/Commr(A)/KDL dated 25.03.2013 allowing the appeal filed by the respondent.

4. The Commissioner of Customs, Kandla did not find the OIA dated 25.03.2013 to be legal and proper and therefore directed the Assistant Commissioner of Customs(Drawback) to file revision application. It was observed that the Notification No. 84/2010-Cus(NT) dated 17.09.2010 was prospective in effect and therefore drawback would not be available if the benefit under Rule 18 or Rule 19 had been taken on inputs. This notification had come into force on 20.09.2010 whereas before this date Notification No. 103/2008-Cus(NT) dated 29.08.2008 was in force which provided that the rates of drawback in the drawback schedule would not be applicable to products manufactured or exported by availing the rebate of central excise duty paid on materials used in manufacture of export goods in terms of Rule 18 of the CER, 2002 or if such raw materials were procured without payment of central excise duty under Rule 19(2) of the CER, 2002. In this view, it was opined that the drawback claim for exports made before 20.09.2010 were inadmissible. The Assistant Commissioner had accordingly filed revision application against the OIA dated 25.03.2013.

5.1 The respondent filed cross objection/submission vide letter dated 18.12.2013 in response to the revision application filed by the Department. They firstly submitted that in Notification No. 84/2010-Cus(NT), the rates of drawback for both CENVAT availed as well as for CENVAT not availed was the same and therefore the drawback admissible was only in respect of the customs component. Thereafter they placed reliance upon the Board Circular No. 35/2010-Cus dated 17.09.2010 ad pointed out that the rate of drawback for

CENVAT availed & CENVAT not availed was 1% for items in drawback table of chapter 23 meaning the AIR drawback admissible was only in respect of the customs component. Therefore, drawback would be available to them even if the rebate of central excise duty paid on raw materials used in the manufacture of export goods had been availed under 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. The respondent further pointed out that condition no. (6) of Notification No. 84/2010-Cus(NT) was identical to the condition no. (5) & (6) of Notification No. 68/2007-Cus(NT) and Notification No. 103/2008-Cus(NT). They further contended that the Circular No. 35/2010-Cus was a beneficial circular and must be applied retrospectively. In this regard, they placed reliance upon the judgments of the Hon'ble Supreme Court of India in CCE, Bangalore vs. Mysore Electricals Ind. Ltd.[2006(204)ELT 517(SC)] and Suchitra Components Ltd. vs. CCE, Guntur[2007(208)ELT 321(SC)] and the Hon'ble Tribunals decision in the case of Bezel Pharma Pvt. Ltd. vs. CCE, Mumbai[2008(221)ELT 512(Tri-LB). Appeal against the order of the Tribunal was dismissed by the Hon'ble Supreme Court. The respondent further urged that the revenue is bound by the circulars issued by the Board and placed reliance upon the judgments in the case of CCE, Vadodara vs. Dhiren Chemicals Ltd.[2002(139)ELT 3(SC)] and Paper Products Ltd. vs. CCE[1999(112)ELT 765(SC)].

5.2 The respondents further averred that the issue involved in the present case stands settled by the decisions of the Government In Re : Aarti Industries[2012(285)ELT 461(GOI)] and In Re : Mars International[2012(286)ELT 146(GOI)]. The only factor that would bar drawback would be the availment of double benefit. They therefore opined that the Appellate Authority had rightly concluded that it was unambiguously clear that they had claimed only customs portion of 1% drawback and even if there was any rebate claim for excise portion, it would not amount to double benefit. The respondent submitted that it was a settled proposition of law that the Department having accepted the principle laid down in earlier cases cannot be permitted to take a contradictory stand in

subsequent cases and placed reliance upon the judgments of the Hon'ble Apex Court in the cases of CCE vs. Novopan Industries Ltd.[2007(209)ELT 161(SC)] and Jayaswals Neco Ltd. vs. CCE[2006(195)ELT 142(SC)]. In the light of these submissions, the respondent prayed that the revision application filed by the Department be dismissed and the impugned OIO be upheld.

6.1 The respondent was granted a personal hearing on 03.10.2019. Shri Rajesh Rawal, Advocate and Shri Abhijit Parulekar, Manager Imports attended the hearing on behalf of the respondent. They reiterated the written submissions filed by them. They submitted that the Departments only ground was that Circular no. 35/2010-Cus dated 17.09.2010 was prospective in effect although the notifications for AIR drawback had identical conditions. They pointed out that the Commissioner(Appeals) had dealt with the aspect of double benefit and that the Department had not given any argument to counter it. They stated that they would again file written submissions within 2 weeks. However, no such submission has been received.

6.2 Shri H. U. Patel, Superintendent(DBK), Custom House, Kandla attended the personal hearing on 15.10.2019 on behalf of the Department and submitted letter dated 09.10.2019 of the Assistant Commissioner(DBK), Kandla stating that they had nothing more to add and requested that the case may be decided on merits.

7.1 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 the revision application 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.

7.2 It is observed that the respondent 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 during 2007-2010. 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.

8. Government finds that the respondent has 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.

9.1 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.

9.2 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 and the drawback sanctioned and paid to the said respondent is liable to be recovered alongwith interest.

9.3 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 or based on any hypothesis of double benefit. 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.

10. Government therefore sets aside the impugned OIA No. 244/2013/CUS/Commr(A)/KDL dated 25.03.2013 and restores the OIO No. KDL/AC/MG/626/DBK/2011 dated 28/31.03.2012 passed by the Assistant

Commissioner of Customs(Drawback), Kandla. The revision application filed by the Department is allowed.

11. So ordered.

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

ORDER No.199/2020-CX (WZ) /ASRA/Mumbai DATED 11.09.2020

To,

M/s Ruchi Soya Industries Ltd.
614, Tulsiani Chambers,
Nariman Point,
Mumbai 400 021

Copy to:

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