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. 380/86/DBK/14-RA/5988 Date of Issue: 16.10.2020

ORDER NO.203/2020-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,
Kandla

Respondent : M/s Laxmi Solvex
Durgapura, Dewas,
Madhya Pradesh

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 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. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 passed by the Commissioner of Customs(Appeals), Kandla in the case of M/s Amira Foods (India) Ltd., 54, Prakriti Marg, M. G. Road, New Delhi(hereinafter referred to as "the merchant exporter").

2.1 M/s Amira Foods (India) Ltd. were engaged in the export of agriculture products including Soya Bean De Oiled Cake(hereinafter referred to as DOC) in the year 2006-07 to 2009-10 falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975. Shri Abhijeet Mazumdar was General Manager of M/s Amira Foods (India) Ltd. at the relevant time. All the activities of the merchant exporter relating to export and availment of duty drawback had taken place as per his directions. The said merchant exporter had exported Soya De Oiled Cake from Kandla Port falling under the jurisdiction of the Commissioner of Customs, Kandla under claim of drawback.

2.2 M/s Laxmi Solvex Ltd., Durgapura, Dewas(hereinafter referred to as "the respondent"), is a manufacturer 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 merchant exporter which was exported by the merchant exporter by 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 merchant exporter had exported the DOC falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975 from Kandla Port by availing the benefit under Duty Drawback. The said DOC was purchased by them from the manufacturers who 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 merchant exporter 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 merchant exporter and the investigation carried out at the end of the manufacturer, 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 person of the merchant exporter, the manufacturer and the legal position mentioned above, it appeared that the merchant exporter had wrongly claimed and availed duty drawback amounting to Rs. 8,25,600/- from Kandla 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 merchant exporter 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 merchant exporter 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 merchant exporter 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 merchant exporter, Shri Abhijeet Mazumdar, General Manager of the merchant exporter at the relevant time who looked after all the export related work including the availment of drawback at the relevant period and the respondent 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; the respondent had in connivance with the merchant exporter 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) of the Customs Act, 1962 and rendered themselves liable for penalty under Section 114(iii) of the Customs Act, 1962. The merchant exporter, their General Manager & the respondent were 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 had also been asked to show cause

why penalty should not be imposed on them under Section 114(iii) of the Customs Act, 1962 for having abetted the exporter in committing these offences. The merchant exporter, their General Manager and the respondent 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, Custom House, Kandla vide OIO No. KDL/DBK/1454/ADC/SS/2013-14 dated 04/18.11.2013 disallowed the drawback claims amounting to Rs. 8,25,600/- and ordered recovery of the amount of duty drawback already sanctioned/released and directed to pay back the amount of duty drawback erroneously availed by them, appropriated the amount of Rs. 8,25,600/- deposited by them vide D.D. dated 28.12.2010, ordered recovery of interest on the amount of duty drawback erroneously sanctioned, imposed penalty of Rs. 4,00,000/- on the merchant exporter, imposed penalty of Rs. 2,00,000/- on the General Manager of the merchant exporter and imposed penalty of Rs. 2,00,000/- on the respondent.

5. Aggrieved by the OIO, the respondents filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) averred that procurement of raw materials under Rule 19(2) of the CER, 2002 would not be a hindrance for claiming 1% drawback being the customs component. He took note of the fact that the dispute related to the period prior to 17.09.2010. However, he discussed the contents of Circular No. 35/2010-Cus dated 17.09.2010 for interpretation of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) & 103/2008. He observed that condition 5/6 of these notifications identifies the customs component when CENVAT facility has been availed. It also clarifies that in a situation where the drawback under the category of CENVAT facility availed and CENVAT facility not being availed is the same signifies that the drawback pertains only to the customs component. The benefits under Rule 18 and Rule 19(2) would have no effect on drawback of customs component. He observed that the merchant exporter had claimed drawback of 1% of FOB value which was the

customs component of AIR drawback. He averred that rebate of duty on export goods and drawback of customs component does not amount to double benefit. The Commissioner(Appeals) concluded that Notification No. 84/2010-Cus(NT) dated 17.09.2010 & Circular No. 35/2010-Cus dated 17.09.2010 reinforce the position that drawback of customs would be available even if facility under Rule 18 or Rule 19(2) has been availed. He held that circulars are clarificatory in nature and would apply to notifications issued earlier if the provisions therein are identical and that Notification No. 84/2010-Cus(NT) and Circular No. 35/2010-Cus make explicit what was implicit in earlier notification. In the light of these findings, the Commissioner(Appeals) vide his OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 set aside the OIO with consequential relief to the appellants.

6. The Commissioner of Customs, Kandla found that the OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 was not legal and proper and therefore directed the Assistant Commissioner to file revision application on the following grounds :

(i) AIR Drawback is not available when an exporter avails the facility under Rule 19(2) of the CER, 2002 as per condition 7(f) of Notification No. 81/2006-Cus(NT) and 8(f) of Notification No. 103/2008-Cus(NT).

(ii) Rule 5 of the Drawback Rules provides that revised rate of drawback could be given retrospective effect whereas in the instant case the benefit of AIR drawback has been allowed only w.e.f. 20.09.2010 under Notification No. 84/2010-Cus(NT) as clarified by the Office of the Drawback Commissioner vide letter dated 04.01.2012 and therefore there is no retrospective effect.

(iii) Commissioner(Appeals) has ignored the clarification dated 04.01.2012 issued by Commissioner(Drawback), misinterpreted Board Circular No. 35/2010-Cus and Notification No. 84/2010-Cus(NT) although it clearly mentions that it is effective only w.e.f. 20.09.2010.

(iv) Reliance was placed on the judgment of the Hon'ble Supreme Court in the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)] wherein it was held that where it was evident that inputs had not suffered any duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed.

(v) Reliance was also placed upon the judgment of the Hon'ble Supreme Court in the case of CCE, Chandigarh-I vs. Mahaan Dairies[2004(166)ELT 23(SC)], Hon'ble Delhi High Court in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)]. Reliance was placed upon the decision in the case of Sterling Agro Industries Ltd. Government of India Order No. 214-215/10-Cus dated 06.07.2010 against which the party filed W.P. No. 5894/2011 before the Division Bench of the Gwalior Bench of Hon'ble High Court of Madhya Pradesh and their Lordships held that drawback would be admissible under Rule 3(1) of the Drawback Rules if the benefit from payment of duty or rebate of CENVAT had been reversed, thus upholding the stand that simultaneous availment of drawback and Rule 19(2) cannot be permitted.

(vi) The case laws of Mars International[2012(286)ELT 146(GOI)] and Aarti Industries Ltd.[2012(285)ELT 461(GOI)] relied upon by the Commissioner(Appeals) in the impugned order pertained to the period after 20.09.2010 after issuance of Notification No. 84/2010-Cus(NT) dated 17.09.2010.

(vii) Even the C & AG had pointed out this fraud in PAC Audit Report No. 15/2011-12 in para 2.3.12.

7. The respondent failed to file reply/cross objection to the revision application filed by the Department. Shri H. U. Patel, Superintendent(DBK) appeared for hearing on behalf of the Department on 03.03.2020 and reiterated the grounds of revision application. The respondent was granted opportunity for personal hearing on 24.09.2018, 08.01.2020, 14.01.2020, 25.02.2020 and

03.03.2020. However, they failed to avail of the opportunity of personal hearings on any of the appointed dates.

8. 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 this revision application is whether duty drawback @ 1% of FOB value is admissible to the exporter 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.

9. It is observed that the detailed investigation has established that 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 merchant exporter during 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.

10. Government finds that the merchant exporter and the respondent have not denied the fact of duty free procurement of inputs and their use in the manufacture of DOC by the manufacturer respondent 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 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.

11.1 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.

11.2 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 merchant exporter and the drawback sanctioned and paid to them is liable to be recovered alongwith interest. In this regard, the Government observes that the name of the noticee merchant exporter does not figure in the list of appellants against OIO No. KDL/DBK/1454/ADC/SS/2013-14 dated

04/18.11.2013. The merchant exporter has not filed appeal against the OIO No. KDL/DBK/1454/ADC/SS/2013-14 dated 04/18.11.2013. The said noticee 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 manufacturer. As held by the courts from time to time, admitted facts need not be proved.

12.1 Government proceeds to consider the case for imposition of penalty on the merchant exporter and the manufacturer who has supplied DOC to the exporter. The respondent has not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing the goods. The fact that further weakens any possible defence is 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. There are a total of 18 manufacturers/exporters involved in the proceedings under the impugned order. Besides these manufacturers/exporters 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 claiming 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 merchant exporter as well as the manufacturer 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. The exporter had actually claimed the drawback which was inadmissible while the respondent had abetted them. Hence, both the merchant exporter as well as the respondent have rendered themselves liable to be penalised separately.

12.2 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 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 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 the declarations. As such the merchant 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 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 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 the respondent.

13. Government therefore sets aside the impugned OIA No. 67 to 89/2014/Cus/Commr(A)/KDL/2014 dated 10.03.2014 and restores the OIO No. KDL/DBK/1454/ADC/SS/2013-14 dated 04/18.11.2013 passed by the Additional Commissioner of Customs, Custom House, Kandla and allows the Revision Application filed by the applicant.

14. So ordered.

15/9/20

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

ORDER No:203/2020-CX (WZ) /ASRA/Mumbai DATED 15.09.2020

To,

M/s Laxmi Solvex Ltd.
Durgapura, Dewas,
Madhya Pradesh

Copy to:

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