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. 380/62/DBK/13-RA /6209
F. No. 380/61/DBK/13-RA
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Date of Issue: 18.11.2020

ORDER NO. 206-208/2020-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
Sarda House, Opp. Panchwati,
Bedi Bunder Road,
Jamnagar 361 002

Respondent : M/s Adani Enterprises Ltd.
Adani House,
Near Mithakhali Six Road,
Navrangpura, Ahmedabad – 380 009
& Two Others

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 31 to 33/Commr(A)/JMN/2013 dated 21/22.02.2013 passed by the Commissioner of Customs(Appeals), Jamnagar.

ORDER

These revision applications have been filed by the Commissioner of Customs(Preventive), Jamnagar(hereinafter referred to as "the applicant" or "the Department") against OIA No. 31 to 33/Commr(A)/JMN/2013 dated 21/22.02.2013 passed by the Commissioner of Customs(Appeals), Jamnagar in the case of M/s Adani Enterprises Ltd.(hereinafter referred to as "the respondent no. 1") and two others.

2.1 M/s Adani Enterprises Ltd., Adani House, Near Methakhali Six Road, Navrangpura, Ahmedabad(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) falling under Tariff Item No. 2304 0020 of the First Schedule to the Customs Tariff Act, 1975 during the period from 2006-07 to 2009-10. Shri Atul Chaturvedi(hereinafter referred to as "respondent no. 2") was the Chief Executive Officer of respondent no. 1 firm at the relevant time. He was overall in-charge of respondent no. 1 for all the activities relating to export and availment of duty drawback had taken place as per his directions. Similarly, Shri Bharat Dixit(hereinafter referred to as "respondent no. 3") was the Associate Manager of respondent no. 1 who looked after the work relating to availment of drawback by the respondent no. 1 and was also responsible for wrong availment by respondent no. 1. The 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 Ambika Solvex Ltd. and M/s Dhanlaxmi Solvex Pvt. Ltd.(hereinafter referred to as "the manufacturer" or "the manufacturers" collectively) 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.

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 who had manufactured the same 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, the documents of duty free procurement of hexane by availing the benefit under Rule 19(2) of the Central Excise Rules, 2002 were 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 and the legal position mentioned above, it appeared that the respondent no. 1 had wrongly claimed and availed duty drawback amounting to Rs. 18,46,639/- 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 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 in these acts of omission and commission on the part of respondent no. 1, respondent no. 2 - Shri Atul Chaturvedi, Chief Executive Officer of respondent no. 1, respondent no. 3 - Shri Bharat Dixit, Associate Manager of respondent no. 1 who together 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 abetting in

commission/omission of an act rendering such DOC liable for confiscation under Section 113(i) of the Customs Act, 1962 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 manufacturers of DOC 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 and respondent no. 3 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. 04/Addl.Commr./2012 dated 24.03.2012 disallowed the drawback claims amounting to Rs. 18,46,639/- and ordered recovery of the amount of duty drawback erroneously granted, ordered recovery of interest on the amount of duty drawback erroneously sanctioned, imposed penalty of Rs. 25,00,000/- on respondent no. 1 under Section 114(iii) of the Customs Act, 1962, imposed penalty of Rs. 40,00,000/- on respondent no. 1 under Section 114AA of the Customs Act, 1962, imposed penalty of Rs. 2,50,000/- on respondent no. 2 under Section 114(iii) of the Customs Act, 1962, imposed penalty of Rs. 4,50,000/- on respondent no. 2 under Section 114AA of the Customs Act, 1962, imposed penalty of Rs. 1,00,000/- on respondent no. 3 under Section 114(iii) of the Customs Act, 1962, imposed penalty of Rs.

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

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. 31 to 33/Commr(A)/JMN/2013 dated 21/22.02.2013 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, and the manufacturers in the findings recorded in the OIO and accordingly all five were liable to penalty.

7. Personal hearing was granted in the matter. Shri Shekhar Chavan, Assistant Commissioner appeared on behalf of the Department on 13.09.2019 and reiterated the grounds of revision application. He further submitted that the impugned OIA be set aside and the revision application filed by the Department be allowed. The respondents appeared for personal hearing on 03.12.2019. Shri Jitendra Motwani, Advocate and Shri Anshu Shah, Advocate appeared on their behalf and submitted that the impugned OIA be set aside. Thereafter, the respondents filed written submissions on 11.12.2019.

8.1 The respondents submitted that it was proved beyond doubt that the customs component of the AIR drawback would be available even if the rebate of central excise duty paid on raw materials used in manufacturing 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. They referred the Board Circular No. 35/2010-Cus dated 17.09.2010 and stated that the customs component of AIR

drawback would be available even if rebate of central excise duty paid on raw materials used in manufacturing 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. It was submitted that the Notification No. 84/2010-Cus(NT) dated 17.09.2010 in connection with which the clarification had been issued vide Circular No. 35/2010-Cus dated 17.09.2010 contained the same condition which is present in the notifications availed by them. The respondents averred that a conjoint reading of these notifications and the circular reveals that the availment of 1% drawback pertains only to the customs component was not restricted to only Notification No. 84/2010-Cus(NT) dated 17.09.2010 but was in effect clarificatory and had retrospective effect.

8.2 The respondents further submitted that the issue involved in the present case was no longer res integra as the Government of India had occasion to deal with a similar issue in the cases of Mars International[2012(286)ELT 146(GOI)] and Aarti Industries Ltd.[2012(285)ELT 461(GOI)]. It was inferred that in these cases, the Government of India had held that customs component of AIR drawback was available even if the rebate of central excise duty paid on raw materials used in the manufacture of exported goods had been taken in terms of Rule 18 of the CER, 2002 and that allowing the rebate of duty when drawback of customs portion was available would not amount to double benefit even after availment of CENVAT credit of duties of central excise as paid for the inputs used in the manufacture of such exported goods which were cleared on payment of duty of central excise. The respondents averred that the explanatory circulars/notifications were in the nature of judgments of courts which only interpret the existing rights and therefore the explanatory circular/notification was to be treated as part and parcel of the notification and would be operative from the date of the original notification viz. 13.07.2006. It was further argued that in the absence of clarificatory notification, the original notification was required to be read as

explained in the subsequent explanatory notification. In this regard, they placed reliance upon the judgments in the case of Commissioner vs. Sesa Goa Ltd.[2015(321)ELT A66(SC)] upholding the decision of the CESTAT, Mumbai in the case of Commissioner vs. Sesa Goa Ltd.[2014(299)ELT 221], W.P.I.L. Ltd. vs. CCE, Meerut, U.P.[2005(181)ELT 359(SC)], Loyal Textile Mills Ltd. vs. Jt. Secretary, M.F.(D.R.)[2012(280)ELT 8(Mad)] and Apex Steels (P) Ltd. vs. CCE, Chandigarh[1995(80)ELT 368(Trb)].

8.3 The respondents submitted that their bonafides cannot be doubted due to the alleged fraud/misrepresentation on the part of the manufacturers. They stated that they carried bonafide impression that the manufacturer had not availed any benefit under the Central Excise Act, 1944 and the rules made thereunder. They further averred that they could not be faulted and no demand for recovery of drawback can be made against them for non-following of procedures by the manufacturers as prescribed under the law. They contended that the Department ought to have demanded duty from the manufacturer instead of disallowing the drawback which was rightly sanctioned vide the impugned OIA. The respondents placed reliance upon the judgments in the case of Industrial Chem. Manufacturing Co. Ltd. vs. CC(Import), Nhava Sheva[2015(317)ELT 262(Tri-Mum)], Deep Exports vs. CC, New Delhi[2016(338)ELT 742(Tri-Del)], CC, Amritsar vs. Gopi Chand Krishan Kumar Bhatia[2013(295)ELT 739(Tri-Del)].

8.4 The respondent further contended that the allegations of suppression and mis-declaration on their part were bald and baseless and that there was no cogent evidence to prove these allegations. Therefore, the extended period of limitation cannot be invoked in this case. It was further argued that the investigation initiated by the Department did not clearly mention that the goods in dispute were manufactured out of non-duty paid hexane. It was also averred that the Department had wrongly alleged that the respondents had deliberately mis-declared the fact in Appendix-III that the exported goods had been manufactured by availing the benefit under Rule 19 of the CER, 2002.

They submitted that they never had any intention to violate any provisions or any condition of the notification. It was further stated that none of the statements of respondent no. 2 and respondent no. 3 implicated the respondents and indicated that they had knowledge that the manufacturers had availed the benefit of Rule 18/Rule 19 of the CER, 2002. It was averred that in the absence of any positive evidence implicating the respondents to have suppressed anything or willfully suppressed the facts with intention to evade duty, the larger period of limitation could not have been invoked. In this regard, the respondents placed reliance upon the judgments in the case of Commissioner vs. Transasia Bio-Medicals Ltd.[2015(326)ELT A138(SC)] which upheld the decision of the CESTAT in the case of Transasia Bio-Medicals Ltd. vs. Commissioner[2013(297)ELT 429(Tri-Ahmd)] & Steer Engineering Pvt. Ltd. vs. CCE, Bangalore-II[2017(358)ELT 390(Tri-Bang)].

8.5 The respondents further argued that it was settled law that the onus was on the Department to present evidence in support of the allegation which they have failed to produce in this case. In this regard, reliance was placed upon the judgment in the case of Phoenix Mills Ltd. vs. UOI[2004(168)ELT 310(Bom)]. The respondent averred that no positive evidence was on record nor was any proof adduced by the Department to prove that the respondents had deliberately mis-declared the facts in Appendix-III with the intent of obtaining drawback and that mere omission would not constitute suppression of facts as they were under the bonafide belief that the manufacturer had not procured raw materials under Rule 19 since ARE-2 had not been issued to them alongwith the invoices. They therefore averred that no malafide can be proved against them and that extended period of limitation cannot be invoked. The respondents further submitted that since the duty liability itself is not sustainable, the imposition of interest was ruled out. In this regard, they placed reliance upon the judgment in the case of Prathibha Processors vs. UOI[1996(88)ELT 12(SC)]. It was also stated that once duty was not payable, the question of levy of penalty would not arise and placed reliance upon the

judgments in the case of CCE vs. HMM Ltd.[1995(76)ELT 497(SC)] and CCE, Aurangabad vs. Balakrishna Industries[2006(201)ELT 325(SC)].

9.1 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.

9.2 It is observed that the detailed investigation has established that the manufacturers 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 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.

10. 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.

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. 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. 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. 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.

12.1 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. Notwithstanding the fact that there is no time limit for recovery under Rule 16 of the Drawback Rules, 1995, the Department is undoubtedly 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. Hence the SCN is not hit by limitation.

12.2 Assuming for a moment that there is any merit in the submission of the respondents that it has not been proved by the investigation that only non-duty paid inputs were used in the manufacturing process, it is observed from the statement of Shri Sanjay Kapoor, Head of Department(Accounts) of M/s Ambika Solvex Ltd. that he has admitted to using of common pipelines and common storage facility for hexane used in the manufacture of DOC. 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. The notifications allowing drawback do not leave any scope for interpretation of the

degrees/percentages in which materials could be used in the manufacture. Since the pipelines and storage facility are common, the respondents are no longer in a position to claim that duty paid inputs were used for 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. Convenient interpretation which does not emanate from the text of the notification cannot be inserted into it. The text of the notification is sacrosanct and any attempt to add words to or deduct words therefrom would be unacceptable.

13.1 Government proceeds to consider the case for imposition of penalty on the exporter, the CEO and Associate Manager of the exporter and the manufacturers who have supplied DOC to the exporter. The manufacturers have not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing multiple consignments of goods over a period of a few years. 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 synchronized 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 cleared from Kandla Port and Bedi Port in Gujarat have been manufactured by manufacturers located in Madhya Pradesh. Moreover, the very same manufacturers are involved in multiple such cases involving different merchant exporters. One would have to be extremely naïve to be convinced that such repetitive failures in issuing ARE-2's and misdeclaration in Appendix-III's are legitimate coincidences. It cannot be lost sight of that preponderance of probability is the standard for evaluating the facts and not proof beyond doubt.

13.2 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 respondent has availed drawback on export goods inspite 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 two manufacturers in the present case and by several manufacturers in all the cases booked by the DGCEI are by themselves are 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.

13.3 Government therefore infers that the procedure adopted by the manufacturers in not issuing ARE-2 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 manufacturers 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 and the exporter are liable to be penalized.

14.1 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 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.

14.2 In so far as imposition of penalty on respondent no. 2 and respondent no. 3 are concerned, Government observes that respondent no. 2 Shri Atul Chaturvedi was the Chief Executive Officer of respondent no. 1. Being the CEO he would be in a position of authority to take decisions. His statement has been recorded during the investigation and he has stated that all the works, export related activities and availment of duty drawback of respondent no. 1 were being allocated by him to different persons working in the organization. He has stated that he was aware that simultaneously availing duty drawback alongwith the benefit of Rule 18/Rule 19 of the CER, 2002 was not permissible as per law. On the other hand Shri Bharat Dixit the Associate Manager of respondent no. 1 has fairly admitted in his statement recorded by the DGCEI stated that Shri Atul Chaturvedi was overall in-charge of the respondent company. Shri Bharat Dixit is subordinate to Shri Atul Chaturvedi and did not have the authority to take decisions or have the option to do things differently. He was merely taking instructions and discharging his duties. Government finds that the decision to avail drawback in respect of DOC procured from two manufacturers who have both not issued ARE-2's in respect of several consignments exported over a period of a few years and thereby enabled the exporter to avail drawback would undoubtedly be a conscious decision taken with the knowledge of the CEO of the company. In

the circumstances, Government finds that the penalty for exporting goods whose particulars do not correspond with information furnished by the exporter and for filing false declaration imposed on Shri Atul Chaturvedi, CEO of respondent no. 1 would suffice to meet the ends of justice. The proposal to penalize Shri Bharat Dixit, Associate Manager of the respondent no. 1 would be excessive and must be set aside.

15. Government therefore sets aside the impugned OIA No. 31 to 33/Commr(A)/JMN/2013 dated 21/22.02.2013 and restores the OIO No. 04/Addl. Commr./2012 dated 24.03.2012 passed by the Additional Commissioner of Customs(Prev), Jamnagar. However, the penalty imposed upon respondent no. 3 - Shri Bharat Dixit, Associate Manager is set aside. The revision applications filed by the Department are allowed in the above terms.

16. So ordered.

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

ORDER No. 206-208 /2020-CX (WZ) /ASRA/Mumbai DATED 15.09.2020

To,

1. M/s Adani Enterprises Ltd.
   Adani House,
   Near Methakhali Six Road,
   Navrangpura, Ahmedabad – 380 009
2. Shri Atul Chaturvedi
   Chief Executive Officer of M/s Adani Enterprises Ltd.,
   Adani House,
   Near Methakhali Six Road,
   Navrangpura, Ahmedabad – 380 009
3. Shri Bharat Dixit
   Associate Manager of M/s Adani Enterprises Ltd.,
   Adani House,
   Near Methakhali Six Road,

Navrangpura, Ahmedabad – 380 009

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