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. 195/711-714/13-RA
F. No. 195/870-871/13-RA /8290 Date of Issue: 01.07.2021

ORDER NO. 216-221 /2021-CX (WZ) /ASRA/MUMBAI DATED 10.6.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s Cadila Healthcare Ltd.
Plot No. 417-419-420, N.H. 8A,
Sarkhej-Bavla Highway,
Village Moraiya, Taluka Sanand,
Dist. Ahmedabad 382 210

Respondent : Commissioner of CGST & CX, Ahmedabad North

Subject: Revision Applications filed under Section 35EE of the Central Excise Act, 1944 against OIA No. 76 to 79/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.03.2013 & OIA No. 132 to 133/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 25.06.2013 passed by Commissioner(Appeals), Central Excise, Ahmedabad

ORDER

These revision applications have been filed by M/s Cadila Healthcare Ltd., Plot No. 417-419-420, N.H. 8A, Sarkhej-Bavla Highway, Village Moraiya, Taluka Sanand, Dist. Ahmedabad 382 210(hereinafter referred to as "the applicant") against OIA No. 76 to 79/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.03.2013 & OIA No. 132 to 133/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 25.06.2013 passed by Commissioner(Appeals), Central Excise, Ahmedabad.

2. The applicant is a manufacturer exporter and had filed rebate claims under Rule 18 of the CER, 2002. They are paying central excise duty @ 4%(@ 5% w.e.f. 01.03.2011) adv. on their products which fall under chapter 3004.90 of the CETA, 1985. These goods are cleared for home consumption by availing the benefit of Notification No. 4/2006-CE dated 01.03.2006 as amended by paying central excise duty @ 4%(@ 5% w.e.f. 01.03.2011) adv. whereas they were paying central excise duty @ 10% adv. on the same goods if cleared for export under claim of rebate by virtue of Notification No. 2/2008-CE dated 01.03.2008. The applicant had paid duty from the CENVAT account on export clearances. The adjudicating authority had sanctioned cash rebate @ 4% or 5% + cess on the FOB value and the remaining amount was sanctioned by way of credit in their CENVAT account vide OIO No. 3145 to 3147/Rebate/2012 dated 03.08.2012, OIO No. 3148 to 3152/Rebate/2012 dated 03.08.2012, OIO No. 3154 to 3157/Rebate/2012 dated 03.03.2012 and OIO No. 3160/Rebate/2012 dated 03.03.2012.

3.1 The applicant was aggrieved by these OIO's and therefore filed appeal before the Commissioner(Appeals) on various grounds. On taking up the appeals for decision, the Commissioner(Appeals) noted that he had already decided similar issue in the same applicants case and dismissed appeals filed by them. He observed that normal excise duty on all dutiable goods as per CET was 16% and that in the budget 2007-08 it had been reduced to 14% vide Notification No. 2/2008-CE dated 01.03.2008 for all dutiable goods(except petroleum products). Products with lower rates(including P. P.

Medicaments at the rate of 4%) continued to enjoy the earlier rate under various notifications. He further observed that the Govt. had vide DOF No. 334/1/2008-TRU dated 29.02.2008 clarified as under:

> *"2.2 Since the reduction in general rate has been carried out by notification, the possibility of the same product/item being covered by more than one notification can not be ruled out. In such a situation, the rate beneficial to the assessee would have to be extended if he fulfills the attendant conditions of the exemption".*

It was noted that in December 2008, the general rate was reduced from 14% to 8% by amendment in Notification No. 2/2008-CE and not by amendment in the CETA, 1985. Thereafter, in Budget 2010 the general rate of duty was increased to 10%. Throughout this period, P. P. Medicaments were chargeable to 4%(5% w.e.f. 1.03.2011) and manufacturers were supposed to pay duty only as clarified by the Board vide DOF No. 334/1/2008-TRU dated 29.02.2008. The Commissioner(Appeals) therefore averred that the Notification No. 2/2008-CE was not relevant for determining the rate of duty for P. P. Medicaments and that the Notification No. 4/2006-CE specifying duty @ 4% or Notification No. 4/2011-CE specifying duty @ 5% were relevant to decide the rate of duty.

3.2 The Commissioner(Appeals) further observed that para 4.1 of Chapter 8 of the CBEC Manual of Supplementary Instructions, 2005 provides that "the goods shall be assessed to duty in the same manner as the goods for home consumption". It was also found that the applicant was availing the benefit of Notification No. 4/2006-CE dated 01.03.2006 upto February 2010 for all their clearances. Thereafter, from March 2010 onwards the applicant had started to clear the goods for home consumption at 4%(5% from March 2011) duty for home consumption and 10% duty for exports. This dual rate of duty had been adopted by the applicant as they had accumulated credit and wanted to encash it by debiting higher rate of duty for exported goods by claiming rebate in cash. Commissioner(Appeals) averred that it has to be appreciated that CENVAT credit cannot be encashed except as provided under Rule 5 of the CCR, 2004. The applicant was trying to circumvent the provisions of the CCR,

2004 which was not permitted under the guise of availing two notifications simultaneously.

3.3 With regard to the various case laws relied upon by the applicant, the Commissioner(Appeals) observed that the judgments of the apex court were for applying only one rate of duty which is beneficial to the applicant and not for applying two rates at the same time. In so far as the part payment in cash and allowing of the remaining amount in the CENVAT credit account, the Commissioner(Appeals) found it justified as whatever amount was payable had been paid in cash and the amount which was not payable had been re-credited in the CENVAT credit account. He found that this issue had been settled by the Hon'ble High Court of Punjab and Haryana in the case of Nahar Industrial Enterprises Ltd. vs. UOI[2009(235)ELT 22(P&H)]. The Commissioner(Appeals) therefore held that the applicant was required to pay duty @ 4%(5% w.e.f. 01.03.2011) only for both types of clearances; i.e. home consumption or for export and therefore dismissed the appeals and upheld the OIO's vide his OIA No. 76 to 79/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.03.2013.

3.4 In another set of rebate claims, the adjudicating authority had sanctioned cash rebate @ 5% + cess on the FOB value and sanctioned the remaining amount by way of credit in their CENVAT account under Rule 18 of the CER, 2002 read with Section 11B of the CEA, 1944 vide OIO No. 2612 to 2615/Rebate/2012 dated 15.06.2011 and OIO No. 2900 to 2905/Rebate/2012 dated 16.07.2012. The applicant was aggrieved by these orders and filed appeal before the Commisioner(Appeals). The Commissioner(Appeals) rejected these appeals and upheld the OIO's vide his OIA No. 132 to 133/2013(Ahd-II)CE/AK/Commr(A)/Ahd dated 26.06.2013.

4. Aggrieved by the OIA No. 76 to 79/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.03.2013 and OIA No. 132 to 133/2013(Ahd-II)CE/AK/Commr(A)/Ahd dated 26.06.2013, the applicant has filed revision applications on the following grounds:

(a) the applicant contended that both Notification No. 4/2006-CE and Notification No. 2/2008-CE had been issued by the Central Government under Section 5A(1) of the CEA, 1944 with the approval of the Indian Parliament; that medicaments of heading 3004 of the First Schedule to the CETA are chargeable to central excise duty of 4.12% under Notification No. 4/2006-CE dated 01.03.2006 as amended by Notification No. 4/2011-CE dated 01.03.2011 with Entry No. 62C whereas the very same medicaments of heading 3004 of the CETA are chargeable to central excise duty of 10.30% under Notification No. 2/2008-CE dated 01.03.2008. The applicant averred that they were at liberty to avail either of two different tariff notifications approved by the Parliament for the same medicaments of heading 3004 of the First Schedule to the CETA.

(b) the applicant averred that it was a settled proposition of law that when the legislature has enacted two different tariff notifications in respect of the same finished excisable goods, it was upto the central excise assessee to choose one which is most beneficial to them for a given consignment of the finished excisable goods and placed reliance upon the decision in the case of Mangalam Alloys Ltd. vs. CCE, Ahmedabad[2010(255)ELT 124(Tri-Ahmd)].

(c) the applicant placed reliance upon the judgment in the case of CCE, Baroda vs. Indian Petrochemicals Corporation Ltd.[1997(92)ELT 13(SC)], HCL Ltd. vs. CCE, New Delhi[2001(130)ELT 405(SC)] to lend strength to their stand that when there are two exemption notifications covering the same goods the assessee is entitled to choose the one which gives him better relief; that the central excise authority does not have any say in the matter and that even if one notification is general and the other is specific to the goods the assessee would be entitled to choose between the two.

(d) the applicant placed reliance upon the judgment in the case of Share Medical Care vs. UOI[2007(209)ELT 321(SC)] wherein the apex court had held that even when an applicant does not take the benefit of a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage and that the Hon'ble Apex Court was further pleased to observe that the option to choose a beneficial notification is with the assessee and not with the Department.

(e) the applicant drew attention to Chapter 9 of the Supplementary Instructions issued by the CBEC on 01.09.2001 which still subsist, whereby the Board had clearly maintained that the expression "refund" under Section 11B of the CEA also means rebate of duty paid on export goods. Further, in terms of para 7.2 of Chapter 9 of the Supplementary Instructions, a refund or rebate is always to be given only by cheque and the adjudicating authority does not have any jurisdiction to allow rebate by way of CENVAT credit in the CENVAT credit account of the applicants. Therefore, the OIOs passed by the original authority granting rebate under Rule 18 of the CER, 2002 by way of CENVAT credit was bad in law.

(f) the applicant referred Circular No. 795/28/2004-CX dated 28.07.2004 which was in favour of the applicants. They also invited attention to Circular No. 937/27/2010-CX dated 26.11.2010 which stood overruled by the decision of the Hon'ble Tribunal in the case of Hyva (India) Pvt. Ltd. vs. CCE, Belapur[2010-TIOL-1410-CESTAT-MUM].

(g) the applicant pointed out that the same Central Government had issued another Notification No. 30/2004-CE dated 09.07.2004 whereby all textile products which are also specified in Notification No. 29/2004-CE dated 09.07.2004 had been exempted. The Notification No. 30/2004-CE granted exemption from payment of central excise duty subject to the condition that no CENVAT credit of duty paid on inputs had been claimed. It was contended that if the Departments contention in these proceedings is accepted, then the textile industries do not have any scope to clear their finished excisable goods at the rate of 4% adv. upto 01.03.2011 and at the rate of 5% adv. thereafter. The applicant submitted that both these notifications co-exist and have been approved by Parliament. They averred that when two notifications are in existence, it was upto the textile industry to select the one which is suitable to the manufacturer and that there was no will of the Department to direct the textile industries to clear specified textile goods only at nil rate of duty on account of Notification No. 30/2004-CE dated 09.07.2004.

(h) the applicant drew attention to a similar case wherein the Commissioner(Appeals), Central Excise, Mumbai Zone-I had decided the matter in favour of M/s Cipla Ltd. vide OIA dated 21.03.2011 issued under F. No. 4/M-I/2011/Mumbai.

(i) the applicant stated that it was settled question of law that whatever central excise duty was paid on export goods is to be returned back by the Excise authorities to the exporter and placed reliance upon the decision in the case of CCE, Bangalore vs. Maini Precision Products Pvt. Ltd.[2010-TIOL-1663-CESTAT-Bang] wherein the Hon'ble Tribunal had allowed rebate of central excise duty paid on CIF value.

5. The applicant was granted personal hearings in these revision applications on 21.12.2017, 02.01.2018, 22.08.2019, 01.10.2019, 09.12.2020, 16.12.2020, 23.12.2020 & 29.01.2021. However, the applicant failed to appear for personal hearing on any of the appointed dates. Therefore, the matter is being taken up for decision based on records and submissions of the applicant.

6. Government has carefully gone through the case records, the written submissions made by the applicant, the revision application filed by them, the impugned order and the order passed by the adjudicating authority. The applicant has failed to avail of the opportunities granted to them for personal hearing on several dates. In the circumstances, the case is taken up for decision on the basis of the available records. Government finds that the issue for decision in these revision applications is whether the applicant is entitled to choose to avail the benefit of notification no. 02/2008-CE dated 01.03.2008 as per which the goods are chargeable to duty @ 10.3% adv. when the same goods are cleared to domestic consumption availing notification no. 04/2006-CE dated 01.03.2006 as amended by notification no. 04/2011-CE dated 01.03.2011 as per which the goods are chargeable to duty @ 4.12% or 5.15% adv. The applicant has also raised the ground that the rebate claims filed by them had been restricted to the FOB value of the goods whereas they were eligible for rebate of the entire central excise duty that had actually been paid on the exported goods and that the Tribunal had allowed rebate of central excise duty paid on CIF value of export goods.

7.1 The Notification No. 2/2008-CE dated 01.03.2008 issued under Section 5A(1) of the CEA, 1944 is a notification prescribing effective rate of

duty for goods specified under first schedule to the CETA, 1985. The said notification was amended by Notification No. 58/2008-CE dated 7.12.2008 which reduced the effective rate of duty from 14% adv. to 10% adv. Thereafter, the effective rate of duty was further reduced from 10% adv. to 8% adv. by Notification No. 4/2009-CE dated 24.02.2009.

7.2 While presenting Budget 2010-11, the Finance Minister mentioned in his speech that "The improvement in our economic performance encourages a course of fiscal correction even as the global situation warrants caution. Therefore, I propose to partially roll back the rate reduction in Central Excise duties and enhance the standard rate on all non-petroleum products from 8 per cent to 10 per cent *ad valorem*." Accordingly, Notification No. 2/2008-CE dated 01.03.2008 was amended by Notification No. 6/2010-CE dated 27.02.2010 and the effective rate of duty for the goods specified under the first schedule to the CETA, 1985 was enhanced from 8% adv. to 10% adv. Although, the Central Excise Notification No. 2/2008-CE, 58/2008-CE. 4/2009-CE and 6/2010 are issued under the power of Section 5A(1) of the CEA, 1944 which empowers the Central Government to exempt excisable goods of any description from the whole or any part of the duty of excise leviable thereon. However, it can be seen that by Notification No. 6/2010-CE dated 27.02.2010, the effective rate of duty was enhanced from 8% adv. to 10% adv.

7.3 It simply means that the standard rates of excise duty or merit rate are changed by the Central Government by issuing notification under the powers of Section 5A(1) of the CEA, 1944. At the same time, concessional rates of duty on all excisable goods are also effected by the Central Government through the notifications which are also issued under the powers of Section 5A(1) of the CEA, 1944. These concessional rates may be linked to some conditions.

8.1 As per the provisions of Para 4.1 of Part I of Chapter 8 of the Supplementary Manual, the goods cleared for export shall be assessed to duty

in the same manner as the goods cleared for home consumption. In the case laws relied upon by the applicant, the appellate authority had held that when two exemption notifications are available, it is up to the assessee to choose the one which is beneficial to him. In the present case, the applicant had availed the benefit of two notifications simultaneously which was not permissible as per law. If two exemption notifications are in existence, it would be his prerogative to avail the one which is beneficial to him. The applicant could not have availed the benefit of two notifications simultaneously for the same goods without maintaining separate accounts of inputs. The applicant was entitled to the benefit of only one notification out of the two which was beneficial to him and pay duty accordingly. The benefit of both notifications selectively without separate accounting of inputs cannot be availed simultaneously.

8.2 The availment of higher rate of CENVAT credit on the inputs utilised for the manufacture of medicaments entailed that only part of such CENVAT credit was being used to pay lower rate of duty on the final products cleared for home consumption by availing the benefit of exemption under Notification No. 4/2006-CE dated 01.03.2006 whereas the balance of the accumulated CENVAT credit on such inputs was used to pay duty on medicaments cleared for export at higher rate of duty in terms of Notification No. 2/2008-CE dated 01.03.2008 which specified the effective rate of duty. Such a practice would detract from the concept and purpose of the CENVAT scheme. When the applicant preferred to utilise two separate notifications for home consumption and export of the same goods, the CENVAT credit utilised for clearance of the exported goods was required to be restricted to the proportion of inputs utilised in their manufacture. Concept of tax on export to be zero rated cannot mean that tax not concerning with export is loaded on export goods somehow to encash the same. Alternatively, the applicant should have maintained separate account for the inputs utilised in the manufacture of exported goods and claimed rebate at higher rate utilising CENVAT credit on such inputs used in the manufacture of such goods.

8.3 Ratio laid down by the judgment of the Hon'ble Gujarat High Court in the case of Arvind Ltd. vs. UOI[2014(300)ELT 481(Guj.)] which has thereafter been affirmed by the Hon'ble Supreme Court[2017(352)ELT A21(SC)] is relevant here. In that case, inspite of there being an exemption notification which fully exempted their goods, Arvind Ltd. had availed the benefit of Notification No. 59/2008-CE dated 07.12.2008 and paid duty on the export goods. The relevant portion of the said judgment of the Hon'ble Gujarat High Court is reproduced below.

> *"9. On, thus, ...It is, thus, an undisputed fact that the petitioner on final products discharged the duty liability by availing the benefit of Notification No. 59/2008 and as has already been noted in the record, it has reversed the amount of Cenvat credit taken by it on the inputs used for manufacturing of such products. Thus, when the petitioner is not liable to pay duty in light of the absolute exemption granted under Notification No. 29/2004 as amended by Notification No. 59/2008-C.E. read with the provision of Section 5A(1A) of the Act and when it has not got any other benefit in this case, other than the export promotion benefits granted under the appropriate provision of the Customs Act and Rules (which even otherwise he was entitled to without having made such payment of duty), we are of the firm opinion that all the authorities have committed serious error in denying the rebate claims filed by the petitioner under Section 11B of the Act read with Rule 18 of the Rules. The treatment to the entire issue, according to us, is more technical rather than in substance and that too is based on no rationale at all.*
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> *10. We also cannot be oblivious of the fact that in various other cases, the other assessees have been given refund/rebate of the duty paid on inputs used in exported goods. ....."*

8.4 In the above judgment, Hon'ble High Court has laid down that when there are two exemption notifications which co-exist, the assessee can avail one for domestic clearances and the other one which is beneficial to them for export so as to obtain refund/rebate of duty paid on inputs used in the exported goods(emphasis supplied). Thus, as long as, intent is to get refund/rebate of duty paid on inputs consumed in exported goods, exporter

can choose to pay higher rate of duty on exported goods, even if it is an effective rate. Hon'ble High Court has not decided that an applicant while paying higher duty on exported goods can utilise the CENVAT credit not related to inputs consumed/used in exported goods but accumulated due to availment of another notification prescribing lower rate of duty for domestic clearances. This would result in encashment of accumulated credit not related to inputs consumed/used in exported goods.

8.5 In the instant case, since applicant did not maintain separate accounts for utilising inputs while availing concessional rate for domestic clearances and paying duty at effective rate while exporting, the applicant was required to follow provisions of Supplementary Manual, and the goods cleared for export were required to be assessed to duty in the same manner as the goods cleared for home consumption. Therefore, the original authority has correctly refunded only the duty actually payable in terms of the Notification No. 4/2006-CE dated 01.03.2006 and sanctionable as rebate in cash and allowed re-credit of the amount in excess of the duty actually payable in the CENVAT account from which the applicant had made payment of the same amounts under the guise of availing the benefit of Notification No. 2/2008-CE dated 01.03.2008. Succinctly stated, the amount allowed as re-credit was not duty actually payable and hence was not rebatable. In such manner the original authority has adhered to the mandate of para 7.2 of Chapter 9 of the Supplementary Instructions directing that rebate is to be given only by cheque.

9.1 In the RA No. 195/870-871/13-RA, the applicant has placed reliance upon the decision in the case of CCE, Bangalore vs. Maini Precision Products Pvt. Ltd.[2010-TIOL-1663-CESTAT-Bang] stating that the Hon'ble Tribunal had allowed rebate of central excise duty paid on CIF value in that case. It is observed that the applicant had not raised this ground during the proceedings before the lower appellate authority viz. the Commissioner(Appeals) at the time of passing of impugned OIA No. 132 to 133/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.06.2013. The fact that the applicant had

not raised this ground before the Commissioner(Appeals) would mean that they had acquiesced to the order of the original authority holding that they were eligible for rebate only to the extent of the FOB value of the goods. Government places reliance upon the judgment of the Hon'ble Supreme Court in the case of Commissioner of Cus. & C. Ex., Goa vs. Dempo Engineering Works Ltd.[2015(319)ELT 359(SC)] to hold that when the applicant had not raised this ground before the Commissioner(Appeals), the applicant cannot raise this new ground in the revision proceedings.

9.2 Even otherwise for export goods place of removal is port of export. The relevant statutory provisions for determination of value of excisable goods are extracted below :

As per basic principle applicable - Section 4(1)(a) of Central Excise Act, 1944 where duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of said goods such value shall,

(a) In a case where the goods are sold by the assessee, for delivery at time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.

(b) In other case, including the cases where the goods are not sold be the value determined in such manner as may be prescribed.

Word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows :

"'Sale' and 'Purchase' with their grammatical variations and cognate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."

Place of Removal has been defined under Section 4(3)(c)(i), (ii), (iii) as :

(i) A factory or any other place or premises of production of manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) A Depot, Premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

The Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also relevant which is reproduced below :-

*"**Rule 5.** Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal up to the place of delivery of such excisable goods.*

Explanation 1. - "Cost of transportation" includes -

(i) The actual cost of transportation; and

(ii) In case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods."

10. Government observes from the perusal of above provisions that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal.

11. Government draws attention to the judgment of the Hon'ble Supreme Court in Civil Appeal No. 5541 of 2004, decided on 23-4-2015 in the case of Roofit Industries Ltd. [2015 (319) E.L.T. 221 (S.C.)] wherein the question of determination of 'place of removal' for the purpose of Central Excise Act, 1944 was considered by the Supreme Court. In this case, the Supreme Court was considering the issue as to whether the goods were sold at the factory gate or at the premises of the buyer where the seller had arranged for transportation and insurance of the goods during transit. The Supreme Court, vide order dated 23.04.2015 set aside the order of CESTAT and confirmed inclusion of

freight, insurance and unloading charges in the assessable value for excise duty under Section 4 of the Central Excise Act, 1944, thus holding the buyers' premise to be 'the point of sale'.

At para 11 & 12 of the said judgment, the Hon'ble Supreme Court has observed as under :

> *"11. In Commissioner of Central Excise, Noida v. Accurate Meters Ltd. - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), the Court took note of few decisions including in the case of Escorts JCB Ltd. and reiterated the aforesaid principles by emphasizing that the place of removal depends on the facts of each case.*
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> *12. The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with Valuation Rules."*

12. Government further notes that CBEC vide Circular No. 988/12/2014-CX dated 20.10.2014 has clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of Transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where the sale has taken place or when the property of goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

13. Government observes that in the case of Commissioner of Central Excise, Aurangabad v. Roofit Industries Ltd., the fact was that the assessee has received a work order from various Government authorities and private contractors and the agreements entered into by the assessee with the above mentioned parties were for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. The agreement required the assessee, for delivery of the finished goods not at the factory gate, but the premises of the buyer. The Apex Court held after going through the terms and conditions of the contract, it is clear that the goods have to be delivered at the place of buyer and it was only at that place where the acceptance of supplies was to be effected and as such price or transaction value are inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges. However, in the instant case the applicant is claiming the freight & insurance i.e. outward handling charges incurred beyond the place of removal i.e. port of export and hence ratio of the Hon'ble Apex Court Order in the case of Roofit Industries Ltd. (supra) cannot be made squarely applicable to the present case.

14. Government further observes that the Ministry has further clarified vide its Circular No. 999/6/ 2015-CX, dated 28-2-2015 as to what is the "place of removal" for taking CENVAT credit of services used for export of goods for two types of exports, one for direct export and another for deemed export. Place of removal for direct export is mentioned in para 6 as under;

> *"6. In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer Exporter and* ***place of removal would be this Port/ICD/CFS.*** *Needless to say, eligibility to CENVAT Credit shall be determined accordingly."*
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> Whereas for deemed export it is mentioned in para 7 as under;

7. In the case of export through merchant exporters, however, two transactions are involved. First is the transaction between the manufacturer and the merchant exporter. The second transaction is that between the merchant exporter and the foreign buyer. As far as Central Excise provisions are concerned, the place of removal shall be the place where the property in the goods passes from the manufacturer to the merchant exporter. As explained in paragraph 4 supra, in most of the cases, this place would be the factory gate since it is here that the goods are unconditionally appropriated to the contract in cases where the goods are sealed in the factory, either by the Central Excise officer or by way of self-sealing with the manufacturer of export goods taking the responsibility of sealing and certification, in terms of Notification No. 19/2004-Central Excise(N.T.) dated 6.9.2004, etc.

8. However, in isolated cases it may extend further also depending upon the facts of the case ***but in no case, this place can be beyond the Port / ICD / CFS where shipping bill is filed by the merchant exporter.*** *The eligibility to CENVAT Credit shall be determined accordingly."*

15. Moreover, Government observes that GOI in its Orders No. 411-430/13-Cx dated 28.05.2013 In Re: M/s GPT Infra Projects Ltd. and Order No. 97/2014-Cx dated 26.03.2014 In re : Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] has categorically held that

"it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it cannot be beyond the port of loading

of the export goods. It can either be factory, warehouse or port/Customs Land Station of export and expenses of freight / insurance etc. incurred upto place of removal form part of assessable value. Under such circumstances, the place of removal is the port/place of export since sale takes place at the port /place of export.

At para 9 of its Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] GOI held that

"9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above. Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

16. In view of the facts and discussion herein above, Government observes that in this case the applicant is a Merchant exporter and hence the place of removal shall be the place where the property in the goods passes from the manufacturer to the merchant exporter and transaction value is required to be arrived at accordingly, but in no case, this place can be beyond the port of export. Accordingly, Government holds that freight and insurance for transport of goods and other charges incurred beyond port of export cannot be part of the transaction value. Therefore, the rebate sanctioned to the respondents has correctly been restricted to the duty payable on FOB value of the exported goods.

17. In the light of the findings recorded above, Government does not find any ground to modify the OIA No. 76 to 79/2013(Ahd-II)CE/AK/Comm(A)/Ahd dated 26.03.2013 & OIA No. 132 to 133/2013(Ahd-

II)CE/AK/Comm(A)/Ahd dated 25.06.2013 passed by Commissioner(Appeals), Central Excise, Ahmedabad.

18. The revision applications filed by the applicant are rejected.

Shrawan 10/06/21

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

ORDER No. 216-221 /2021-CX (WZ) /ASRA/Mumbai DATED 10.06.2021

To,
M/s Cadila Healthcare Ltd.
Plot No. 417-419-420, N.H. 8A,
Sarkhej-Bavla Highway,
Village Moraiya, Taluka Sanand,
Dist. Ahmedabad 382 210

Copy to:

1. Commissioner of CGST & CX, Ahmedabad North Commissionerate
2. Commissioner of CGST & CX, (Appeals), Ahmedabad
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy