

SPEED POST



**F. No. 198/10/2019—R.A.
198/13-20/2019-R.A.
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)**

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue. 28/10/21

Order No. 219-227/2021-CX dated 28-10-2021 of the Government of India, passed by Shri Sandeep Prakash, Additional Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944.

Subject: Revision Application filed under Section 35 EE of the Central Excise Act, 1944 against the Orders-in-Appeal Nos. NOI-EXCUS-002-APP-141-19-20 dated 08.05.2019 and NOI-EXCUS-002-APP-219 to 226-19-20 dated 21.05.2019 passed by the Commissioner of CGST (Appeals), NOIDA.

Applicant: Commissioner of CGST & Central Excise, Gautam Budh Nagar.

Respondent: M/s India Yamaha Motor Pvt. Ltd., Gautam Budh Nagar.

ORDER

Nine Revision Applications, bearing nos. 198/10/2019-R.A. dated 26.08.2019 and 198/13-20/2019-R.A. all dated 03.09.2019, have been filed by the Commissioner of CGST & Central Excise, Gautam Budh Nagar (hereinafter referred to as the Applicant) against the Orders-in-Appeal Nos. NOI-EXCUS-002-APP-141-19-20 dated 08.05.2019 and NOI-EXCUS-002-APP-219 - 226-19-20 dated 21.05.2019 passed by the Commissioner of CGST (Appeals), NOIDA, wherein the appeals filed by M/s India Yamaha Motor Pvt. Ltd., Gautam Budh Nagar (hereinafter referred to as the Respondents) against Orders-in-Original Nos. 161-167/DC/2017 dated 21.06.2017 passed by the Deputy Commissioner, LTU, New Delhi involving rebate claims of Rs. 215,91,19,454/- & Rs. 67,83,67,302/- (Total Rs. 283,74,86,756/-), and Nos. 330/R/AC/D-I/GBN/2018-19 dated 11.06.2018, 346/R/AC/D-I/GBN/2018-19, 347/R/AC/D-I/GBN/2018-19, 348/R/AC/D-I/GBN/2018-19, 349/R/AC/D-I/GBN/2018-19, 350/R/AC/D-I/GBN/2018-19, 351/R/AC/D-I/GBN/2018-19 and 352/R/AC/D-I/GBN/2018-19 all dated 16.07.2018, passed by the Assistant Commissioner, CGST, Gautam Budh Nagar, involving rebate claims of Rs.46,61,13,858/-, have been allowed with consequential relief.

2. The brief facts leading to the present proceedings are that the Respondents were engaged in the manufacture of excisable goods, namely, Motor Cycles, Scooters and their parts, falling under Chapter 87 of the First Schedule to the Central Excise Tariff Act, 1985. The Respondents were exporting their manufactured goods under the claim of rebate of duty under Rule 18 of the Central Excise rules, 2002, read with Notification No. 19/2004-CE (NT) dated 06.09.2004. Rebate claims for Rs. 215,91,19,454/- were filed by the Respondents with Large Taxpayers Unit (LTU), New Delhi and the same were sanctioned, allowing cash payment of the amount of tax on the costs incurred up to the factory gate and the balance amount, i.e., amount of tax corresponding to the expenses incurred after removal from the factory, up to the Port of Export, was allowed as re-credit in CENVAT account. Aggrieved with the decision of the original authority of not paying the full amount in cash, the Respondents preferred appeals before the Commissioner (Appeals), Delhi-II (having jurisdiction over the LTU at the material time). It was averred that the place of removal should have been considered as Port of Export instead of the factory gate. The Commissioner (Appeals), vide Order-in-Appeal No. 405-20/CE/AppI-II/Delhi/2016 dated

31.01.2017, remanded the matter back to the original authority with the direction to decide the claims after determining the 'place of removal'. In the *de-novo* proceedings, the original authority (LTU) clubbed the matter with other pending rebate claims of Rs. 67,83,67,302/- and rejected the rebate for the whole amount, including the amount sanctioned earlier in cash, vide the aforesaid Order-in-Original dated 21.06.2017, on the ground that as the Respondents could not produce consignment wise figures of freight and insurance charges for each agreement with the buyers, the 'place of removal' was not possible to be ascertained and consequently, the admissible amount could not be arrived at. After disbanding of LTU with the advent of GST regime, the original authority at Gautam Budh Nagar also rejected the Respondents' other rebate claims on similar lines. Aggrieved again, the Respondents filed appeals with the Commissioner (Appeals), who, vide the impugned Orders-in-Appeal, has set aside the Orders-in-Original dated 21.06.2017, 11.06.2018 and 16.07.2018 and allowed the appeals of the Respondents with consequential relief.

3. The instant RAs have been filed, mainly, on the ground that the impugned Orders-in-Appeal were flawed as the Commissioner (Appeals) had failed to decide the main issue involved, i.e., the 'place of removal' of the exported goods and that rebate had been allowed in spite of failure of the Respondents to comply with the conditions of notification no. 19/2004-CE(NT) dated 06.09.2004, wherein it has been stipulated that the rebate claim will be sanctioned only if the jurisdictional Assistant/Deputy Commissioner of Central Excise is "*satisfied that the claim is in order*". Cross objections have been filed by the Respondents on 11.10.2019 and 21.10.2019. Further written submissions have been filed by the Applicant department on 16.07.2021 & 07.10.2021 and by the Respondents on 09.07.2021, 12.08.2021, 12.08.2021 and 30.09.2021.

4. The revision applications have been filed with delays of 11 and 8 days. Administrative reasons have been cited for delay. Delay is condoned.

5. Personal hearing was held on 09.07.2021 and 22.09.2021. Sh. Sanjay Bharati, Superintendent, appeared for the Applicants and reiterated the contents of the revision application. Sh. Lakshmi Narsimhan, Advocate, made submissions on behalf of the Respondents. He invited attention to the cross-objections and written submissions filed and highlighted that the issue viz. the 'place of removal' for exported goods is the 'port of

export' is well settled. The Applicant department filed updated position, vide letters dated 16.07.2021 & 07.10.2021, whereas the Respondents have filed additional submissions dated 30.09.2021 wherein, Orders-in-Original, outlining the basis for calculating the post factory gate expenses, have been appended.

6.1 The Government has examined the matter carefully. In the subject cases, the Respondents have paid duty on the excisable goods exported by them on FOB value basis and have claimed the rebate under Rule 18 of the Central Excise Rules, 2002 read with the Notification No. 19/2004-CE (NT) dated 06.09.2004. The genesis of the dispute is that the Applicant department took a view that the goods had been sold at the factory gate and, as such, the cost elements incurred after the removal from the factory gate could not be included in the assessable value for payment of Central Excise duty. Therefore, in the rebate claims amounting to Rs. 2,15,91,19,454/- covered by the impugned Order-in-Appeal dated 08.05.2019, the original authority initially took a view that the 'place of removal' was the factory gate and sanctioned the rebate, in cash, of the excise duty paid proportionate to the value accordingly. The differential duty, i.e., difference between the duty paid by the Respondents on the FOB value basis and the duty proportionate to the value at the factory gate, was sanctioned by way of re-credit in the CENVAT credit account. In the appeal filed by the Respondents, the Commissioner (Appeals), vide Order-in-Appeal dated 31.10.2017, observed that the original authority had decided the 'place of removal' without analyzing the conditions of the sale agreements, as required in terms of Board's Circular No. 999/6/2015-CX dated 28.02.2015 and Circular No. 988/12/2014-CX dated 20.10.2014. Therefore, the matter was remanded to the original authority to examine the sale agreements and decide the rebate claims, after determining 'place of removal' in the light of terms of relevant sale agreements and after analyzing the figures of freight and insurance charges consignment wise. In the de-novo proceedings, the original authority, vide aforesaid Order-in-Original dated 21.06.2017, observed that the assessee, i.e., the Respondents herein did not have any specific ex-factory price in case of export of goods and the consignment wise invoices and bills in respect of post removal expenses were not directly available. Therefore, the original authority held that it was unable to determine the 'place of removal' and consequently unable to arrive at actual rebate entitlement of the assessee, *"even though the assessee is eligible for the rebate*

claim to the extent of duty paid on transaction value." Consequently, the rebate claims were rejected in full.

6.2 The Government observes that this Order dated 21.06.2017 of the original authority is flawed for the following reasons:

- (i) In respect of the rebate claims amounting to Rs. 2,15,91,19,454/-, the original authority, in the first instance, had after obtaining the figures from the Respondents herein, allowed the rebate, in cash, to the extent of duty payable on ex-factory price (approx. Rs.211.13 Crores) and also allowed the balance duty paid to be recredited in the CENVAT account (approx. Rs. 4.77 Crores). Therefore, it is incorrect to state that the bifurcation of the cost in respect of the expenses post clearance from factory gate was not available.
- (ii) The matter was raised before the Commissioner (Appeals) by the Respondents herein to the extent of amount which was permitted to be re-credited in the CENVAT account with a claim that this amount should also be paid in cash. The department had not challenged the orders permitting rebate in cash corresponding to the duty paid on the ex-factory price basis nor did the department dispute the bifurcation of cost adopted by the original authority.

Therefore, undoubtedly, the dispute was limited to the admissibility of rebate in cash on excise duty portion corresponding to the expenses incurred post the removal of the goods from the factory gate, i.e., an amount of about Rs. 4.77 Crores only. As such, it was not open to the original authority to deny the entire claim in the de-novo proceedings, that too after holding that the Respondent is eligible for the rebate claim on the duty paid on the transaction value. The findings of the Commissioner (Appeals) in the impugned Order-in-Appeal dated 08.05.2019, on this count, can, therefore, not be faulted.

6.3 In the other cases involving rebate claims of Rs. 67,83,67,302/- covered by the Order-in-Appeal dated 08.05.2019 and all the cases covered by the Order-in-Appeal dated 21.05.2019 also, the entire rebate claim has been rejected though the dispute only related to the inclusion of charges, post removal of the goods from the factory gate, in the assessable value. There is no averment that the nature and terms of transaction between the Respondents and their overseas buyers have changed in these cases. Thus, the issue for consideration being same and facts being identical, the Applicant department could not

have taken a different stand in these cases as well [*Ref. Birla Corporation Ltd. Vs. Commissioner of Central Excise, Nagpur 2005(186) ELT 266 (SC)*].

7.1 As already highlighted above and as specifically agitated by the department in the instant RAs, the basic issue that is required to be decided for the disposal of the present lis is the 'place of removal' of the goods exported by the Respondents, i.e., whether it is the 'factory gate' or the 'port of export'. It is also noted that the revision applications do not allege any other contravention of Rule 18 and the notification no. 19/2004-CE (NT) dated 06.09.2004, except the issue of correct transaction value arising out of dispute in respect of the 'place of removal'.

7.2 The Government observes that the contention of the Respondents is that as per the Basic Purchase Agreement and the Purchase Orders, the ownership and risk of loss or damage to products shall pass to the overseas buyers under the conditions of Free on Board at the designated Indian Port and, therefore, sale of product takes place at the designated Port and not the factory gate. Accordingly, it is contended that the 'port of export' is the 'place of removal'. On the other hand, the department's view is that the 'place of removal' in the instant case is 'factory gate'. This view was initially taken by the original authority in the Orders-in-Original, culminating into the earlier Order-in-Appeal dated 31.01.2017, on the basis of Article 3 of the Sale Agreement between the Respondents and the overseas buyer, i.e., Yamaha Motor Co. Ltd., Japan (YMC). The original authority took note of the fact that, as per the said Article 3, the Respondents could sell the goods to YMC only, outside India, and recorded that "*Since, such goods are exclusively manufactured and sold to the YMC, the ownership on the goods are transferred to their customer YMC immediately after the goods are manufactured and dispatched from their factory since such goods cannot be diverted to any other person*". In other words, the view taken by the department was that since the Respondents herein could sell the goods only to YMC, Japan, the ownership of the goods cannot be transferred to any other person and as such it was transferred to YMC at the factory gate itself. The Government observes that while the finding that the goods can be sold only to YMC is factually correct, this by itself does not necessarily imply that the ownership was transferred to YMC at the factory gate itself. On the other hand, it is the Respondents'

contention that, as per the Agreement between the parties, the ownership and risk passes to the buyer in FOB conditions, thereby the ownership passes to the buyer only at the Port of Export. The Government observes that the Respondents undisputedly charged FOB price from their buyers. This substantiates their contention that they are responsible for the goods upto the Port of Export and as such ownership and control passes to the buyer only at the Port of Export. In other words, since the Respondents are being paid for all the cost elements upto the Port of Export, by necessary implication they are responsible for and in control of the goods upto the Port of Export.

7.3.1 In the proceedings before the authorities below as well as the submissions made by both the parties, in the present proceedings, reference has been made to the Instructions issued by the Board, vide aforesaid Circulars dated 20.10.2014 and 28.02.2015. Though these circulars have been issued with respect to the CENVAT Credit Rules, their applicability in the present case is admitted by the department including in the latest submissions dated 07.10.2021. In the Circular dated 20.10.2014, it has been clarified that *"The place where sale has taken place or when the property in goods passes from the seller to the buyer is the relevant consideration to determine the place of removal."* The clarifications contained in Circular dated 28.02.2015 are in continuation of the Circular dated 20.10.2014 and seek to clarify the 'place of removal' specifically in the case of exports, i.e., whether the 'place of removal' is the Port or Airport from where the goods are finally exported. The Government finds that the paras 5, 6 and 7 of the Circular dated 28.02.2015 are apposite to decide the present case.

"5. Clearance of goods for exports from a factory can be of two types. The goods may be exported by the manufacturer directly to his foreign buyer or the goods may be cleared from the factory for export by a merchant exporter.

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

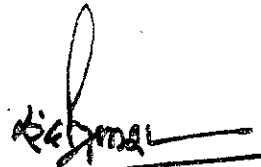
filed by the manufacturer exporter and place of removal would be this Port/ICD/CFS. Needless to say, eligibility to CENVAT Credit shall be determined accordingly.

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."

7.3.2 In the present case, there is no contention that the goods have been exported through a merchant exporter. Therefore, in terms of para 6 of the Circular dated 28.02.2015, the goods having been exported by the Respondents herein as a manufacturer exporter, the 'place of removal' shall be the 'port of export'.

7.4 Thus, in view of the nature and terms of transactions and keeping in view the clarifications issued by the Board, the 'place of removal', in the present case, is the 'port of export'. The Government, accordingly, holds that the Respondents are entitled to claim rebate of duty paid on FOB value basis.

8. For the reasons aforesaid, the revision applications are rejected.



(Sandeep Prakash)

Additional Secretary to the Government of India

Commissioner of CGST & Central Excise,
Gautam Budh Nagar, 3rd Floor, Wegmans Business Park, KP-III,
Greater Noida-201 306.

G.O.I. Order No. 219-227/21-CX dated 22-10-2021

Copy to: -

1. M/s India Yamaha Motor Pvt. Ltd., A-3, Industrial Area, Noida-Dadri Road, Surajpur, Distt. Gautam Budh Nagar-201 306.
2. Commissioner (Appeals), CGST 4th Floor, C-56/42, Renu Tower, Sector-62, Noida-201 301.
3. M/s Lakshmikumaran & Sridharan Attorneys, 5, Link Road, Jangpura Extension, New Delhi.
4. PA to AS (Revision Application)
5. ~~Spare Copy~~
6. Guard File

ATTESTED



(Ashish Tiwari)
Assistant Commissioner (R.A.)