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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.380/52/DBK/2013-RA/5295 Date of Issue: 17.09.2021

ORDER NO. 222/2021-CUS (WZ) /ASRA/MUMBAI DATED 09.09.2021 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962

Applicant : Commissioner of Customs(Preventive), Jamnagar.

Respondent : M/s Ambika Solvex Pvt. Ltd

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal Nos 10 to 11/Commr(A)/JMN/2013 dated 17.01.2013 passed by the Commissioner of Customs(Appeals), Jamnagar.

ORDER

This Revision Application is filed by the Commissioner of Customs(Preventive), Jamnagar (hereinafter referred to as "the Applicant") against the Orders-in-Appeal Nos 10 to 11/Commr(A)/JMN/2013 dated 17.01.2013 passed by the Commissioner of Customs(Appeals), Jamnagar.

2. Briefly M/s Ambika Solvex Pvt. Ltd. 304, Satyageeta Apartment, 90/47, Sneh Nagar Main Road, Indore (M.P.)- 452 001 (herein after as "Respondent") is manufacturer of Soya Bean Meal (De-oiled cake-DOC) by extraction process by crushing Soya seeds in their plants and Hexane is used for production of Soya DOC in the process. The Hexane is either procured on payment of Central Excise duty or without payment of Central Excsie duty by availing the facility under Rule 19(2) of Central Excise Rule 2002. The said DOC was exported through M/s Adani Enterprise Ltd., Merchant Exporter after procuring it from the Respondent and M/s Dhanlaxmi Solvex Pvt Ltd. under the claim of Duty Drawback @ 1% at All Industry Rate.

(i) On specific intelligence, the Directorate General of Central Excise Intelligence (DGCEI), Regional Unit, Indore found that the merchant exporter had exported DOC which was purchased by them from Respondent and M/s Dhanlaxmi Solvex Pvt. Ltd. who had manufactured the same by availing benefit of Rule 19(2) of Central Excise Rule 2002 by procuring Hexane without payment of Central Excise duty following the procedure under Rule 19(2) of Central Excise Rule 2002 and Notification issued there under. The said Hexane procured without payment of Central Excise duty was used in the manufacture of DOC which was exported by the merchant exporter under claim of Duty Drawback @ 1% at All Industry Rate of Drawback 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.

(ii) In view of the provisions of Rule 3 of 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), Drawback is not admissible on export of DOC if the same are manufactured in terms of Sub-Rule (2) of Rule 19 of Central Excise Rules, 2002 by using Excisable material (Hexane) in respect of which duties have not been paid.

(iii) The DGCEI, Indore issued show cause notices dated 17.01.2011 to the merchant exporter, Respondent and M/s Dhanlaxmi Solvex Pvt. Ltd. asking as to why the Drawback claim of Rs.18,46,639/- should not be recovered from the merchant exporter along with interest and why penalty should not be imposed upon Respondent and M/s Dhanlaxmi Solvex Pvt. Ltd. The cases were adjudicated by

(iv) The Additional Commissioner), Customs(Prev.), Jamnagar vide Orders-in-Original Nos. 4/Addl. Commissioner/2012 dated 24.03.2012 wherein it was ordered to recover the DBK amount of Rs. 18,46,639/- along with interest from M/s Adani Enterprise Ltd. And imposed penalties of Rs. 25 lakhs + Rs. 40 Lakhs under Section 114(iii) and Section 114AA of the Central Excise Act, 1962 respectively. Further imposed penalties of Rs. 5 Lakhs on the Respondent and Rs. 2 Lakhs on M/s Dhanlaxmi Solvex Pvt. Ltd under Section 114(iii) of the Central Excise Act, 1962.

(v) Aggrieved with the impugned order, the Respondent then filed appeal before the Commissioner of Customs(Appeals), Jamnagar. The Commissioner (Appeals) vide Orders-in-Appeal Nos 10 to 11/Commr(A)/JMN/2013 dated 17.01.2013 held that

M/s Adani Enterprise Ltd. had claimed only the Customs portion of drawback (1%) and therefore if there is any rebate claim for excise portion, it would not tantamount to double benefit. Further, he did not find any merit in the Order-in-Original and the Respondent and M/s Dhanlaxmi Solvex Pvt. Ltd. are not liable for any penalty. Thus he set aside the Order-in-Original dated 04.11.2013 to the extent it related to imposition of penalty upon the Respondent and M/s Dhanlaxmi Solvex Pvt. Ltd. and allowed the appeals.

3. Aggrieved, the Department then filed the current Revision Applications on the following grounds:

(i). The Appellate Authority had grossly erred and brushed aside and ignored all the statutory provisions, settled legal position and even ignored the clarification dated 04.01.2012 issued by the Office of the Drawback Commissioner, CBEC, New Delhi. The Appellate Authority had allowed the appeal by misinterpreting the Board's Circular No. 35/2010 dated 17.09.2010. It was categorically mentioned in the said Circular as well as in the relevant Notification No. 84/2010-Cus(NT) dated 17.09.2010 that the said Notification was effective from 20.09.2010. Despite that, the Appellate Authority suo moto misconceived the said Circular and observed as under:

> *"I find that the Board's circular which gives a clarification relating to existing law/provisions of Notification, it would apply equally to any law/notifications issued earlier if the provisions are identical."*

Since it was categorically mentioned in the Notification No. 84/2010 ibid and relevant Circular No. 35/2010 dated 17.09.2010 that the same was effective from 20.09.2010, any question of extending the benefit of the said notification was well as Board's Circular No. 35/2010 dated 17.09.2010 in respect of drawback claims pertaining to the period before 20.09.2010 does not arise.

(ii) As per Rule 5 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995:

> *"Rule 5: Determination of date from which the amount of rate of drawback is to come into force and the effective date for application of amount or rate of drawback.*
>
> *(1) The Central Government may specify the period upto which any amount or rate of drawback determined under rule 3 or revised under rule 4, as the case may be, shall be in force.*
>
> *(2) where the amount or rate of drawback is allowed with retrospective effect, such amount or rate shall be allowed from such date as may be specified by the Central Government by notification in the Official Gazette which shall not be earlier than the date of changes in the rates of duty on inputs [or tax on input services] used in the export goods."*

It is clear from the above provisions that since it has been categorically mentioned in the Notification No. 84/2010 Cus (NT) that the same is effective from 20.09.2010, question of giving it retrospective effect does not arise as further clarified by the office of the CBEC's Drawback Commissioner vide letter dated 04.01.2012. It has been specifically mentioned in the said letter that

> *"Since the words of the notification no. 84/2010-Cus (NT) dated 07.09.2010 are clear and have prospective effect, the request for applying the same retrospectively does not arise".*

(iii) The period involved in present dispute was 2006-07 to 2009-10, hence the drawback claims filed by the exporter pertaining to the said period were governed by the provisions of Notification Nos. 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. As per clause 7(f) of Notification No. 81/2006-Cus(NT) and 68/2007-Cus(NT) and clause 8(f) of the Notification No. 103/2008-Cus(NT

> "The rates of drawback specified in the said Schedule shall not be application to export of a commodity or product if such commodity or product –

(a) to (e).....

(f) manufactured or exported in terms of sub-rule (2) of the rule 19 of the Central Excise Rules, 2002."

The above provisions clearly deny the drawback of the entire schedule (whether Excise or Customs components), if facility of Rule 19(2) of the Central Excise Rules, 2002 is availed. In the present case the Respondent had availed drawback on the DOC and Soyabean Meal which was manufactured availing facility of Rule 19(2) of the Central Excise Rules, 2002. Hence, the Exporter was not eligible for drawback (whether Excise or Customs components) in terms of above provisions of Notification Nos. 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.

(iv) Rule 3(1)(ii) of the Drawback Rules, 1995 provides as under:

"No drawback shall be allowed if the said 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."

In the present case the goods exported by the Exporter were manufactured by availing the facility of Rule 19(2) of the Central Excise Rules, 2002 i.e. raw materials/inputs were procured without payment of duty, hence, as per the above said provisions, the Exporter was not eligible for drawback (whether Excise or Customs components). However, the Appellate Authority had over looked the above provisions while deciding the matter in favour of the Respondent.

(v) Also, the Appellate Authority while passing the Order has failed to consider the order of the Revision Authority in the case of M/s Sterling Agro Industries Ltd.,[2011 (269) ELT 113 (GOI)] wherein at Para 15, the Revision Authority has categorically held as under:

"15. In view of above discussion and findings, government, finds that the applicant by way of procuring duty free inputs under rule 19(2) of Central Excise' Rules, 2002 has contravened the clause (ii) of the Second Proviso to rule 3(1) of the Central Excise Drawback Rule, 1995 (Also Condition 7(f) of Notification No. 68/2007-Cus (NT) and Condition No.8(f) of Notification No. 103/2008-Cus. (NT) and therefore no drawback is admissible in this case. As such, Government finds no infirmity in the impugned orders and upholds the same."

The above decision of the Revision Authority is squarely applicable from the facts and circumstances of the present case.

(vi) The following judgments are also relevant in the present case:

(a) The Constitutional Bench of the Hon'ble Apex Court in the case of Shyam Sundar Vs. Ram Kumar (Civil Appeal No. 4680/1993) has held that

"we have quoted both the provisions in juxtaposition to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is a well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectively. The aforesaid principle has full play when vested rights are affected or influenced in the absence of any unequivocal expose; the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet that routinely or conventionally retrospective operation of law is not to be easily deduced. Hypothecation in that regard is ordinarily unwarranted,"

(b) On merit of the admissibility of Drawback also the Hon'ble Supreme Court, in the case of Rubfila International Ltd. vs. Commissioner [2008 (224) E.L.T. A133. (S.C.)] upheld the decision of the Tribunal wherein it was held :

"The Appellate Tribunal in its impugned order had held that even though All Industry Rate was fixed for a particular export product, applicable to all exporters who export the products, when there is evidence that inputs had not suffered any duty, mischief of Rule 3(1)(ii) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1955 was attracted and no drawback can be claimed."

The order of the Hon'ble Apex Court is applicable in this case also as no duty was suffered on any of the inputs/raw material used in the manufacture of export goods DOC.

(c) The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chandigarh-I Versus Mahaan Dairies [2004 (166) E.LT. 23 (S.C.)] has held as under :-

> *"It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to me NotifiCation benefit cannot be conferred "*

(d) The Hon'ble Delhi High Court in the case of M/s Sesame Foods Pvt. Ltd. vs. UOI [2010 (253) ELT 167 (Del.)] denied the drawback and even questioned the applicability of all Industry Rate as under (Para 28):

> *"The very concept of a "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty, either excise or customs duty. If agriculture inputs that are in fact not imported, do not otherwise suffer incidence of excise duty, the question of fixing an AIR for such commodity not arise. The parity sought with HSD is plainly misconceived as HSD is a non-agricultural commodity which is manufactured and otherwise is amenable to levy of excise duties. This fundamental difference was perhaps lost sight of when the Respondents proceeded to fix AIR for sesame seeds. The only manner in which the petitioner could have got the benefit was to show that the sesame seeds were in fact imported. That explains why it repeatedly assured the Respondents that it would provide proof to this effect. And it failed to do so."*

The said judgment of the High Court is squarely applicable in this case as no input has suffered any customs or central excise duty and therefore allowing of All India Rate of Drawback appears not allowable on the said product.

(vii) As regards penalty imposed upon the Respondent, the Adjudicating Authority in the findings recorded in the Order-in-Original has clearly established the malafide intentions of the Respondent and M/s

Dhanlaxmi Solvex Pvt. Ltd. Accordingly, the Respondent is liable for penalty as per the Order-in-Original passed by the Adjudicating Authority.

(viii) From the discussion supra, it clearly emerges that:

(a) The goods exported by the Exporter was manufactured by availing facility of Rule 19(2) of the Central Excise Rules, 2002. As per provisions of Notification No.81/2006 Cus(NT), 68/07 Cus (NT) and 103/2008-Cus(NT) governing the drawback claims during the period under dispute i.e. 2006-07 to 2009-10, drawback claim (whether Excise or Customs components) were not eligble if the goods exported have been manufactured availing facility of Rule 19(2) of the Central Excise Rules, 2002.

(b) The Appellate Authority had grossly misinterpreted the provision of Notification No.84/2010- Cus(NT) dated 17.09.2010 read with CBEC's Circular No. 35/2010 dated 17.09.2010 and applied the same retrospectively to decide the matter in favour of the Respondent.

(c) The Appellate Authority had also failed to take into consideration the clarification issued by the CBEC's Drawback Unit vide letter dated 04.01.2012 under filed No. 609/292/2008-DBK.

(d) In the judgments of various appellate authorities, it has been unanimously observed /held that drawback (whether Excise or Customs components) is not admissible if the duty free raw materials/inputs have been used in the manufacture of export goods.

(e) The Respondent is liable for penalty as per the findings of the Adjudicating Authority.....

(ix) That even otherwise, the Appellate Order is erroneous invalid, bad in law and contrary to the materials on record. The order of the

Commissioner of Customs (Appeals), Jamnagar is prima facie as well as factually incorrect and therefore, is legally not sustainable. The same, therefore deserves to be set aside.

(x) The Applicant prayed that the Order-in-Appeal dated 17.01.2012 be set aside and the Order-in-Original dated 24.03.2012 be upheld.

4. Personal hearing in the case fixed for 25.05.2016, 11.06.2018 and 20.11.2018. On 20.11.2018, on behalf of the Applicant, Shri H.K. Joshi, Superintendent, Kandla Customs attended the hearing and requested for adjournment of the case. The case was adjourned till 29.11.2018. The Respondent vide their letter dated 16.11.2018 requested for another date of hearing. Hence hearing was fixed for 29.11.2018, however none was present. In view of change in Revisionary Authority, the hearing was fixed on 11.01.2021, 18.01.2021, 25.01.2021, 12.02.2021, 17.03.2021, 24.03.2021, 22.04.2021, 06.07.2021 and 20.07.2021. No one appeared on behalf of the Applicant. The Respondent vide their letter dated 19.03.2021 and 14.07.2021 requested to pass order considering their written submission.

5. The Respondent submitted their written submissions on the following ground.

(i) The Respondent is a manufacturer of Soya DOC and M/s Adani Enterprises is the merchant exporter. During the period under consideration the Respondent had manufactured DOC partly availing benefit under Section 19(2) of the Central Excise Rules, 2002 and Notification issued thereon and M/s Adani Enterprises exported the DOC under claim of duty drawback @1% of FOB value of DOC as per all Industry Rate of Drawback Scheme Chapter 23 and as prescribed by notification issued under the scheme. This fact knew only M/s Adani Enterprises and the Respondent was not aware of this fact. The Respondent sold the DOC and what benefits are claimed by the purchaser/exporter was not their subject matter. The penalty imposed on them was not correct as they are not getting any additional benefits by way of fraud. The case was framed as per investigation of DGCEI

Indore, the same was also against the National Litigation Policy, 2010 issued by CBEC and beyond the monitory limits.

(ii) The powers of issuing Show Cause Notice was not delegated to the DGCEI as per Circular No. 14/2014-Customs.:

> *"2. Para 5 of the Board Circular No 44/2011- Cus dated 23.09.2011 clarified that the officers of DRI and DGCEI shall not exercise authority in terms of section 28(8) of the Customs Act, 1962 even though they have been assigned the function of 'proper officers' for the purposes of section 17 and section 28 of the Customs Act 1962 vide notification No 44/2011- Cus (N.T.) dated 6.07.2011."*

So the Order-in-Original passed based on the SCN was issued without authority and liable to be cancelled.

(ii) The Respondent had purchased and used duty free hexane only during the year 2006-07 and 2007-08 only at Production unit at Jaora, and at their other units like Patharia and Kalapipal always used duty paid hexane. The period of use of the duty free hexane was prior to delegation of powers of DGCEI and hence SCN was not legal. Secondly, the SCN must be issued within one year of any so called offence which was not issued and the SCN was invalid.

(iii) The Commissioner(Appeals) passed the order after verification of all the facts and circumstances and no interfere is called for it is clearly mentioned in the order that duty drawback is allowable @1% as per Chapter 23 of the Duty Drawback Schedule as per Notification No. 103/2008-Cus(NT) dated 29.09.2008, the relevant entry No. 23 is as under:

Residue and waste from food industries prepared animal fodder

(A) Drawback when cenvat facility has not been availed rate is 1%

(B) Drawback when cenvat facility has been availed rate is 1 %

As per above mentioned notification duty drawback cannot be denied even if hexane is consumed without payment of duty though in

Respondent's case most of hexane was consumed duty paid and few was without duty paid and question of not allowing those not arises.

(iv) Duty drawback is allowing on

(a) Excise duty paid on raw material consumed

(b)Portion of custom duty paid on raw material consumed

The above term is clarified by Notification No. 84/2010-Cus(NT) dated 17.09.2010 vide Circular No. 35/2010 dated 17.09.2010 as under:

> *"The issue has been examined. The present notification No. 84/2010-Cus. (N.T.) dated 17.09.2010 provides that customs component of AIR drawback shall be available even if the rebate of Central Excise duty paid on raw material used in the manufacture of export goods has been taken in terms of Rule 18 of the Central Excise Rules, 2002, or if such raw materials were procured without payment of Central Excise duty under Rule 19 (2) of the Central Excise Rules, 2002."*

(v) They relied on the following decisions:-

(a) Monte International Versus Commissioner of Customs [2016 (5) TMI 1192 - CESTAT NEW DELHI] - That no power vested to DGCEI till 16/09/2011 for issuing of Show cause Notice.

(b) IN RE : RAMA PHOSPHATE LTD.[2014 (313) E.L.T. 838 (GOI)]

Denial of duty drawback claim - Claim sanctioned previously - notification No. 84/2010-Cus. (N.T.), dated 17-9-2010 - Rule 19(2) - Commission upheld denial of drawback claim but set aside penalty - Held that:- respondent M/s. Rama Phosphate Ltd. is a manufacture who sold the goods to merchant exporter M/s. Pradeep Overseas Ltd. The merchant exporter has not declared the fact of procurement of raw materials duty free under Rule 19(2) by the manufacturer, in the relevant shipping bills. Manufacturer has not made any such miss declaration in any document. The allegation of his connivance with the

merchant exporter is without any documentary evidence. As such the respondents cannot be held liable to penal action under Section 114 of Customs Act, 1962. Government do not find any infirmity in the impugned orders-in-appeal as regards dropping penal proceedings against the respondent and therefore uphold the said up to the extent of dropping penal action against the respondent. - Decided against Revenue

(b) Benny Impex Pvt. Ltd. [2003 (154) E.L.T.300

(c) William Industries GOI Order No. 38/2009-CX dated 30.01.2009.

(d) Aarti Industries Appeal No 49-53/2001 challenged by Department in revision which was also rejected on similar facts of their case. [2013 (7) TMI 838 – (GOI)].

(e) IN RE : AARTI INDUSTRIES LTD. [2012 (285) E.L.T. 461 (GOI)]

"Duty drawback - department contended that allowing rebate of duty when drawback of Customs portion was availed will amount to double benefit was not valid —Held that:- Commissioner (Appeals) had given his detailed findings in the case - Department in their revision applications had not countered even a single argument and simply stated that double benefit of drawback and rebate of duty cannot be allowed - Notification No. 84/2010 provides that customs component of AIR drawback shall be available even if the rebate of Central Excise duty paid on raw material used in the manufacture of export goods has been taken in terms of Rule 18 of Central Excise Rules - if such raw materials were procured without payment of Central Excise duty under Rule 19(2) of the Central Excise Rules - the content of the circular envisage that the Customs component of AIR drawback shall be available even if the rebate of Central Excise duty paid on raw materials used in manufacture of exported goods had been taken in terms of Rule 18 of Central Excise Rules - The position is made amply clear in the Notification No. 84/2010 — decided against revenue."

(vi) The penalty imposed on the Respondent was without any offence and not covered under any provisions mentioned in Finance act and not correct as per following court ruling:-

(a) SUPREME COURT OF INDIA - 2010 (9) TMI 461, 2010 (258) E.L.T. 465 (SC), 2010 (35) VST 1 (SC), 2010 (11) SCR 627, 2010 (9) SCC 630, 2010 (10) JT 192, 2010 (9) SCALE 414

(b) Commissioner of Sales Tax, UP. Vs Sanjiv Fabrics and Hari Oil & General Mills

Penalty - requirement of mens rea is an essential ingredient for the levy of penalty under Section 10(b) read with Section 10A of the Central Sales Tax Act, 1956 - object of Section 10(b) of the Act is to prevent any misuse of the registration certificate but the legislature has, in the said Section, used the expression "falsely represents" in contradiction to "wrongly represents" – Held that –burden would be on the revenue to prove the existence of circumstances constituting the offence – mens rea is a condition precedent for levying penalty under Section 10(b) read with Section 10A of the Act.

As per the judgment of Hon'ble Supreme Court held that in absence of mens rea no penalty is applicable.

(vii) The Respondent prayed that the revision application be rejected.

6. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the short issue in revision application is whether duty drawback @ 1% of FOB value is admissible to the exporter on the exports of DOC under Rule 3(1) of the Drawback Rules read with the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and 103/2008-Cus(NT) dated 29.08.2008.

6. It is observed that the detailed investigation has established that during the period 2006-07 to 2009-10, the Respondent had procured duty free hexane by availing the facility under Rule 19(2) of the Central Excise Rules, 2002 and used the same for the manufacture of DOC and sold the

same to M/s Adani Enterprises, merchant exporter. 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 Central Excise Rules, 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 Central Excise Rules, 2002.

10. Government finds that the Respondent had not denied the fact of duty free procurement of inputs and their use in the manufacture of DOC by them and their export under claim of duty drawback. The inference that can be drawn from the condition in the notifications and Rule 3 of the Drawback Rules that duty should necessarily have been suffered on the inputs used in the export product. This is also the settled legal position. The duty element on the inputs is the primary ingredient for deciding the admissibility of drawback on exports. With regard to the inferences drawn by the Commissioner(Appeals) in the impugned order based on CBEC Circular No. 35/2010-Cus dated 17.09.2010, it is apparent from the text of the circular that the clarification regarding drawback in a situation where the raw materials have been procured without payment of Central excise duty under Rule 19(2) of the Central Excise Rules, 2002 has been specifically stated to be admissible only with reference to Notification No. 84/2010-Cus(NT) dated 17.09.2010. It is pertinent to note that the portion where the issue has been raised in clause (d) of para 4(vi) of the Circular, the notification mentioned is Notification No. 103/2008-Cus(NT) dated 29.08.2008. However, the

notifications determining AIR rate of drawback for the preceding periods do not find mention in the portion where the reference has been answered and only Notification No. 84/2010-Cus(NT) dated 17.09.2010 finds mention. Therefore, it is obvious that the clarification issued by the Board applies only to Notification No. 84/2010-Cus(NT) dated 17.09.2010 which is applicable from 20.09.2010. The issue has been settled beyond doubt by the clarification issued by the Office of the Drawback Commissioner vide his letter F. No. 609/292/2008-DBK dated 04.01.2012 to the Federation of Indian Export Organisation.

11.1 Government takes note of the judgments of the courts on the issue. In the case of Rubfila International Ltd. vs. Commissioner [2008(224)ELT A133(SC)], the apex court upheld the principle that when there is evidence that the inputs had not suffered duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed. So also, in the case of Sesame Foods Pvt. Ltd. vs. UOI [2010(253)ELT 167(Del)], their Lordships held that "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty and if goods like agricultural inputs are not imported and do not suffer incidence of excise duty, the question of fixing AIR for such commodities cannot arise. In the case of Suraj Impex (India) Pvt. Ltd. vs. Secretary, Union of India [2017(347)ELT 252(M.P.)], the Hon'ble High Court of Madhya Pradesh held that simultaneous availment of drawback as well as Rule 19(2) was introduced by omission of clause 8(f) of the erstwhile Notification No. 103/2008 and the introduction of new clause 9(b) in Notification No. 84/2010 which was made effective from 20.09.2010 and explained the same in Circular No. 35/2010. Since the Notification No. 84/2010 was effective from 20.09.2010 and the same cannot be given retrospective effect in the light of the aforementioned facts.

11.2 Government observes that in the case of Anandeya Zinc Oxides Pvt. Ltd. [2016(337)ELT 354(Bom.)], the Hon'ble Bombay High Court had occasion to examine the argument put forth by that manufacturer that drawback of customs portion could be availed along with facility for

procurement of inputs under Rule 19(2) of the Central Excise Rules, 2002. The Hon'ble Bombay High Court found that the view taken by the authorities below that the petitioners in that case could not avail customs drawback under Notification No. 26/2003-Cus(NT) dated 01.04.2003 could not be faulted. It was further held that there was no scope for bifurcating drawback towards customs and excise allocation. Their Lordships noted that the notification clearly provides an exclusion to the applicability of the entire notification in specific situations which have been specified therein; one of which was - goods manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. They opined that nothing could be read into such notification and that it was well settled that taxation and fiscal statutes have to be strictly construed. Their Lordships firmly held that the Courts cannot read words into such provisos. The judgments of the Apex Court and the High Courts are binding precedents. Therefore, Government concludes that AIR drawback is not admissible to Merchant Exporter and the drawback sanctioned and paid to the said exporter is liable to be recovered along with interest.

12. The Respondent has 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 mis-declaring 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. In such cases, the Department is 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 and hence the SCN's are not hit by limitation.

13. Government proceeds to consider the case for imposition of penalty on the manufacturer/Respondent who have supplied DOC to the exporter. The Respondent in their appeal before the Commissioner had submitted that :

> *" That the appellant is not the exporter and so question of non-filing ARE-2 does not come into picture. The adjudicating officer has not specifically stated that what declaration is required to be filed by the appellant. The imposition of penalty on merely on presumption and assumption, without any positive evidence on recored is not only incorrect and illegal but bad in law and required to be quashed and set aside.*
>
> *That the appellant is not aware nor supposed to know about the coresponendence of the drawback claim by M/s Adani Enterprises Ltd. Since the appellant had not exported the goods nor claimed for any drawback, the penalty imposed is without authority and required to be quashed and set aside."*

The Respondent had not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing the goods. The fact that the manufacturer failed in following the procedure in an identical manner as other manufacturers investigated by DGCEI in similar cases booked puts a question mark on their actions. Such synchronized failure in not issuing the ARE-2's cannot be passed off as a coincidence. The fact that further weakens the possible defence about their bonafides that they had not issued ARE-2 is the fact that the DGCEI has booked cases against several manufacturers and exporters who had adopted the same practice of not issuing ARE-2's. Besides this manufacturer/exporter there are other cases booked by the DGCEI which involve identical facts and involve several other manufacturers/exporters. It is therefore apparent that the procedure adopted by the manufacturer 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 as well as the Exporter have rendered themselves liable to be penalized. Judgments quoted by the Respondent is regarding 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 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 both the manufacturer and the exporter are liable to be penalized.

14. Government therefore sets aside the impugned Orders-in-Appeal Nos 10 to 11/Commr(A)/JMN/2013 dated 17.01.2013 passed by the Commissioner of Customs(Appeals), Jamnagar in respect of M/s Ambika Solvex Pvt. Ltd.

15. The revision application filed by the Department is allowed.

Shrawan 9/9/21

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

ORDER No. 222/2021-CUS (WZ)/ASRA/Mumbai Dated 09.09.2021

To,
The Commissioner of Customs(Preventive),
'Sarda House', Bedi Bunder Road,
Opp. Panchwati, Jamnagar
Gujarat – 361 002.

Copy to:

1. M/s Ambika Solvex Pvt. Ltd. 304, Satyageeta Apartment, 90/47, Sneh Nagar Main Road, Indore (M.P.)- 452 001
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.