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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. 380/73-76/DBK/10-RA/3288 Date of Issue: 01.08.2022

ORDER NO. 228-231/2022-CUS (SZ) /ASRA/MUMBAI DATED 27.07.2022 OF THE 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 CUSTOMS ACT,1962.

Applicant : M/s Nitta Gelatin India Ltd. (Formerly Kerala Chemicals & Proteins Ltd.),

Respondent: The Commissioner of Central Excise, Customs & Service Tax, Calicut.

Subject : Revision Applications filed, under Section 129DD of Customs Act, 1962 against the Order-in-Appeal No. 01 to 04/2010 dated 26-02-2010 passed by the Commissioner (Appeals), Cochin.

Remanded by the Hon'ble High Court of Kerala at Ernakulam for fresh decision vide its Order dated 10.02.2022 in Writ Petition No.21194 of 2012

ORDER

The present proceedings are in compliance of the Hon'ble High Court of Kerala, Order dated 10.02.2022 in Writ Petition No. 21194 of 21012 wherein the subject Revision Application is remanded back to the Revisionary Authority for consideration of delay condonation petition filed alongwith the Revision Application.

2. These revision applications have been filed by the Commissioner of Customs and Central Excise (hereinafter referred to as 'the applicant'), Calicut, Kerala against the Orders-in-appeal No. 01-04/2010 dated 26.02.2010, passed by the Commissioner of Customs (Appeals), Cochin in respect of OIOs 15-16/2009-CE(Tech) dated 20.10.2009 and 17-18/2009-CE(Tech) dated 23-11.2009.

3. The brief facts of the case are that the M/s. Nitta Gelatin India Limited (Formerly Kerala Chemicals and Proteins Limited) (herein after referred to as the respondent), are engaged in manufacture of Ossein for export and had been exporting the goods under DEPB Cum-Drawback Shipping Bills. For the manufacture of Ossein, the respondent uses excise duty paid Hrdrochloric acid. In terms of Rule 6 of Customs and Central Excise duties and Service Tax Drawback Rules, 1995, the respondent made application for fixation of Brand Rate of Drawback in respect of the excise duty paid on indigenous inputs. The respondent also claimed drawback of Service Tax paid on certain services as input services for the manufacture and export of the impugned goods. Show Cause Notices were issued to the respondents requiring them to show cause as to why the brand rate claimed by them in respect of Hydrochloric Acid in the applications should not be limited to 1/3rd of the amount claimed. It was alleged in the Notices that as per Rule 3(2)(d) of Customs, Central Excise Duties and Service Tax Draw Back Rules 1995 the average amount of duties on the waste re-used or sold shall be deducted. The materials wasted in the process of manufacture of OSSEIN are used in the manufacture of Di-Calcium Phosphate. The two final products arising out of the processes viz OSSEIN

and Di-Calcium Phosphate (DCP) are in the ratio of 1:2 and the duty paid on Hydrochloric Acid shall be apportioned between the products in the ratio 1: 2. Two third of the duties of excise on materials used for manufacture of DCP shall be deducted and one third only is eligible as Draw back. The payment of Service Tax on certain services cannot be considered as input services relating to exported goods in as much as the claimant's factory is engaged in the manufacture of Ossein and Di-calcium Phosphate and Service tax paid on the services are apparently common for the manufacture of both the above goods.

4. The Deputy Commissioner vide Orders in Original 15-16/2009-CE(Tech) dated 20.10.2009 and 17-18/2009-CE(Tech) dated 23-11.2009, held that only 1/3rd of the Central Excise duty paid on Hydrochloric acid is eligible as provisional drawback on OSSEIN exported and disallowed the balance amount claimed by the respondents and also held that the payment of Service Tax on certain services cannot be considered as input services relating to exported goods. Aggrieved by the above Orders in Original, the respondents filed appeal before the Commissioner Appeal.

5. The Commissioner of Customs (Appeals), Cochin vide Orders-in-appeal No. 01-04/2010 dated 26.02.2010, allowed the drawback of full amount of excise duty paid on Hydrochloric acid and asked the original authority to examine the eligibility of drawback claim of service tax paid on each input service separately.

6. On being aggrieved by the order of Commissioner (Appeals), the applicant department has preferred revision application before Central Government under Section 129 DD of Customs Act, 1962 and the same was decided by the Revisionary Authority to the Government of India vide Order No.64-67/2012-Cus dated 29-02-2012. The Revisionary Authority rejected the revision applications as time barred in terms of section 129 DD of Customs Act 1962.

7. The applicant department challenged the Revisionary Authority's Order by filing a Writ Petition before the Hon'ble High Court of Kerala, bearing Writ

Petition No. 21194 of 2012 on the grounds that the revision filed by the petitioner is within time. The Hon'ble High court of Kerala vide Order dated 10.02.2022 set aside the Order passed by the Revisionary Authority and directed to consider the delay condonation petition filed along with the revision and pass appropriate orders in it, in accordance to law.

8. In view of the High Court Order the case is taken up for fresh decision. The grounds on which the applicant had filed the Revision application against the Orders-in-appeal No. 01-04/2010 dated 26.02.2010, passed by the Commissioner of Customs (Appeals), Cochin, are as follows:

(i) As per Rule 3 (2) (d) of Customs, Central Excise Duties and Service Tax Draw Back Rules, 1995, the average amount of duties on the waste reused or sold shall be deducted. The material wasted in the process of manufacture of Ossein is used in the manufacture of Di-Calcium Phosphate. The bi-product has recoverable value and has to be considered for fixing drawback brand rate. Thus final products arising out of the processes viz Ossein and Di-Calcium Phosphate are in the ratio of 1:2. The duty on Hydrochloric Acid shall be apportioned between the products in the ratio of 1:2. Thus 2/3rd of the duties of excise on materials used for manufacture shall be deducted and 1/3 is only eligible as draw back.

(ii) The Commissioner (Appeals) has relied on Tribunal order in the case of M/s. Narmada Gelatines Ltd. Vs. Commissioner of Central Excise, Bhopal 2009 (233) ELT 332 (Tri. Del). Department has filed appeal against the Tribunal Order before the High Court of Madhya Pradesh.

9. The Personal hearings in this case were fixed on 06.04.2022, 12.05.2022 and 08.06.2022. Ms Latha R., A.C. Legal appeared online for the hearing on 08.6.2022 and reiterated the earlier submissions. She contended that Department's application was received in RA's office within 6 months and she requested for condonation of delay.

10. Government has carefully gone through the relevant case records available in case files, oral & written submissions made by the respondent earlier (letter dated 28-01-2012) and also perused the impugned Orders-in-Original, Orders-in-Appeal and Hon'ble High Court Order.

11. Government observes that in this case the department had filed the revision application vide their letter C.No. IV/16/93/2010-RC dated 27-08-2010 against Commissioner Appeal's Orders in Appeal No. 01-04/2010 dated 26.02.2010. The respondent had argued then that the department's application was time barred. The Government decided the application vide Order No. 64-67/2012-Cus dated 29-02-2012, rejecting the department's appeal on the grounds that the appeal had been filed after the condonable period. The department filed Writ Petition against the said Order wherein the High Court of Kerala decided set aside the Order dated 29-02-2012 passed by the Revisionary Authority and directed to consider delay condonation petition on merits in accordance with law. The issue to be decided now is whether the applicant department had filed the original revision application within the condonable period and also as to whether the Commissioner Appeal was right in allowing the drawback of full amount of excise duty paid on the input viz Hydrochloric Acid.

12. In respect to the condonation of delay, the relevant para from the impugned High Court Order dated 10th February, 2022, is reproduced below:

".....5. The admitted case is that the order in appeal was communicated to the petitioner department on 05.03.2010. The revision application was filed on 08.09.2010. It is the case of the petitioner that the revision was sent by a registered post. Ext.P11 is the list of dispatch register and Ext.P12 is the track details of the particular speed post. ***A perusal of Ext.P12 will show that the article was delivered on 30.08.2010. If that is the case, it is clear that the revision is filed within the condonable period.*** *Rule 8B of the Customs (Appeals) Rules, 1982 is extracted hereunder:*

"8B. Procedure for filing revision application: (1) The revision application in Form No.C.A-8 shall be presented in person to the Under Secretary, Revision Applications, Ministry of Finance, Department of Revenue, Central Secretariat, New Delhi-1, or sent by registered post addressed to said Under Secretary. (2) The revision application sent by registered post under sub-rule (1), shall be

deemed to have been submitted on the date on which it is received in the office of the said Under Secretary."

6. From the above Rule, it is clear that the revision can be sent by registered post also. The revision is received on 30.08.2010 as evident by Ext.P12. If that is the case, as per the Rules also the revision is filed within the condonable permissible period as per the statute...."

13. In view of the above Government holds that the application was filed within the condonable period and condones the said delay and takes up revision application for decision on merit.

14. The Respondent has explained the manufacturing process of Ossein. Hydrochloric Acid (HCL) reacts with crushed bone giving Ossein and leaves a solution of calcium Chloride and mono calcium phosphate. Mono calcium phosphate does not have a market value and as such cannot be sold. This Mono calcium phosphate is further treated with calcium hydroxide giving Dicalcium Phosphate by using different manufacturing process, which is used as animal feed. The respondent contested that HCL loses its identity once Ossein emerges as product and it is not separately used in manufacture of Di-calcium Phosphate.

15. The department's contention is that Di Calcium Phosphate is produced using the waste derived after the manufacture of Ossein, adding lime slurry in the waste. The two products Ossein and Di-Calcium Phosphate emerge in the ratio of 1:2 by weight. Hence, in view of Rule 3(2)(d) of Customs, Central excise Duties and Service Tax Drawback Rules, 1995, $2/3^{rd}$ of the duties of Excise duty paid on HCL has to be deducted.

16. Government observes that the department has appealed against Commissioner Appeal's Order, on two points viz a) As per Rule 3(2)(d), the average amount of duties on the waste reused or sold shall be deducted and b) The Judgement relied on the Tribunal Order in the case of Narmada Gelatines has been appealed before the High court of Madhya Pradesh.

16.1 The relevant portion of Rule 3(2)(d) of the Drawback Rules is produced below:

"(2) *In determining the amount or rate of drawback under this rule, the Central Government shall have regard to, -*

(a) the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;

(b) the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods;

(c) the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;

(d) the average ***amount of duties paid on materials wasted in the process of manufacture*** *and catalytic agents:*

Provided *that if any* ***such waste*** *or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted"*

Ongoing through the aforesaid Rule, Government observes that the Rule stipulates that the average amount of duty paid on the materials wasted in the process of manufacture has to be deducted provided that any such waste or catalytic agent is reused in any process of manufacture or is sold. In this case Government finds that the duty paid material is Hydrochloric acid and when this is treated with crushed bones, Ossein is formed leaving Monocalcium Phosphate which is again treated with lime slurry resulting in Di-Calcium Phosphate. Government finds that in this case, the duty paid material i.e. Hydrochloric acid is neither wasted nor it is reused in any process of manufacture. It is only the waste product Monocalcium Phosphate that has been further processed. Hence Government holds that the respondent is eligible for the full amount of duty paid on Hydrochloric acid as drawback.

16.2 The second point of appeal is that Commissioner Appeal had relied on CESTAT Order in the case of Narmada Gelatines Ltd Vs Commissioner of CEx Bhopal and that the department has filed appeal against the said Order before the High Court of Madhya Pradesh.

16.3 Government observes that Commissioner Central Excise, Bhopal had filed appeal against the said Order vide CEA no. 16/2009 which was linked

to the subsequent appeals filed viz Appeal No. 21/2009, 22/2009, 5/2011. These appeals has been disposed on 11-03-2016 wherein it has been held as follows:

"Counsel appearing for both sides, in all fairness, submits that the issue raised in these appeals is squarely answered in CEA No.7/2013 (Commissioner, Customs and Central Excise, Bhopal Vs. M/s .Narmada Gelatines Ltd.) decided on 11.08.2014.

Accordingly, these appeals are disposed of on the same terms."

16.4 CEA No.7/2013 held the following:

"The question involved in this writ petition pertains to grant of CENVAT Credit to certain product which is used in the.manufacturing of main product as a bye-product.

The order passed by the Tribunal goes to show that finding the question involved in the matter of charging by revenue already decided by the Bombay High Court in the case of Rallis India Ltd. Vs. Union of India [2009] 18 STT 452, the appeal filed by the respondent was allowed.

Inter alia contending that the matter has not been properly decided and even questioning the tenability of the judgment by the Bombay High Court, this appeal has been filed by the revenue.

However, today when the matter is taken up for hearing, parties bring to our notice the judgment rendered by the Supreme Court recently in the case of Union of India Vs. Hindustan Zinc Ltd., [2014] 46 taxmann.com 45 (SC). While deciding the case of Hindustan Zinc Ltd. (supra), the S. L. P. filed against the Bombay High Court has been affirmed by the Supreme Court. In the case of Rallis India Ltd. (supra), similar factual position exists. In the aforesaid judgment itself, as the judgment rendered by the Tribunal based on the Bombay High Court is now affirmed by the Supreme Court as indicated hereinabove, no further question of law arises for consideration in this appeal.

The appeal is therefore dismissed in the light of the law decided in the case of Hindustan Zinc Ltd. (supra)"

17. Further Government observes, though the Revisionary authority vide Order No.64-67/2012-Cus dated 29.02.2012, had rejected the application as time-barred, it was mentioned in the Order that this issue was decided earlier too vide GOI Order No 74/2011-Cus dated 6.04.2011 and that the said Order is claimed to have been accepted by the department.

18. Government observes that Jt. Secretary, GOI vide his Order No74/2011 dated 6-04-2011 issued vide F.no. 371/20/DBK/09-RA and Order No.85/ 2011 dated 18-05-2011 issued vide F.No. 371/13/DBK/09-RA for the same

issue for their Unit at Nagpur had remanded the case back to the adjudicating authority with directions to pass the fresh order. These Orders have been accepted by the department and subsequently the department vide Order dated 30-08-2011, allowed the drawback on the duty paid on Hydrochloric acid.

19. In the light of the above observations, Government finds no infirmity in Order-in-Appeal No. 01 to 04/2010-Customs dated 26-02-2010 passed by the Commissioner of Central Excise, Customs & Service Tax (Appeals), Cochin and rejects the revision applications filed by the applicant department as being devoid of merits.

20. This Revision application is disposed off on the above terms.

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

ORDER No 228-231 /2022-CUS (SZ) /ASRA/Mumbai DATED 27.07.2022

To,

The Commissioner of Customs,
Calicut Commissionerate,
C.R. Building, Manachira,
Kozhikode-673001

Copy to:

1. M/s Nitta Gelatin India Ltd., (Formerly Kerala Chemicals & Proteins Ltd.), Ossein Division, P.O. Kathikudom, Koratty, Trichur District, Kerala-680308
2. The Commissioner of C.Ex, Service Tax & Customs (Appeals), C.R. Building, I.S. Press Road, Cochin, Kerala-673018
3. The Deputy Commissioner (Tech), Calicut Commissionerate, C.R. Building, Manachira, Kozhikode-673001
4. Sr. P.S. to AS (RA), Mumbai
5. Notice Board