



REGISTERED
SPEED POST

F.No. 380/04/DBK/12-RA(Remand)

GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue... 23-9-2015

ORDER NO. 25/2015-CUS DATED 22.09.2015 OF THE GOVERNMENT OF INDIA, PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF CUSTOMS ACT, 1962.

Subject : Revision Application filed under Section 129DD of Customs Act, 1962 against Order-in-Appeal No.GOA/CUSS/GSK/57/2011 dated 09.11.2011 passed by the Commissioner (Appeals), Central Excise and Customs, Goa.

Applicant : Commissioner of Customs, Pune.

Respondent : M/s Cummins India Ltd., Pune.

ORDER

This revision application is filed by the Commissioner of Customs, Pune (hereinafter referred to as the applicant) against the Order-in-Appeal No.GOA/CUSS/GSK/57/2011 dated 09.11.2011 passed by the Commissioner (Appeals), Central Excise and Customs, Goa with respect to Orders-in-Original F.No. ICD/Dighi/143/2011 dated 01.06.2011 passed by the Assistant Commissioner of Customs, Pune. M/s Cummins (India) Ltd. is the respondent in this case. This Revision Application allowed vide Order No.441/12-Cus dated 17.12.2012 was restored to the file of the Central Government for being decided afresh by the Hon'ble High Court of Mumbai vide its Order dated 15.12.2014 in WP No.8588 of 2013.

2. Brief facts of the case are that the respondents M/s Cummins India Ltd. are the manufacturer of IC Engines and parts thereof falling under Tariff Item No 8408. From May, 2005 to February, 2010, they exported these products and claimed drawback against the brand rate letters issued under Rule 6(1)(a) of the Drawback Rules, 1995.

2.1 Subsequently, it was noticed that impugned exported goods had been notified under list of All Industry Rate (AIR) for Drawback under Rule 3 of the Drawback Rules vide Notification No.36/2005-Cus dated 02.05.2005 w.e.f. 05.05.2005. Rather, M/s Cummins India Ltd. filed for determination of drawback rates under Rule 6(1)(a) resort to which is envisaged only where no amount or rate of drawback has been determined in respect of any goods in terms of Rule 3 ibid, by making wrong declarations. Therefore, the Department issued three Show Cause Notices, dated 04.10.2010, 25.11.2010 and 03.12.2010 under Rule 16 ibid for demand and recovery of excess drawback sanctioned. These Show Cause Notices were adjudicated by a common Order-in-Original dated 21.03.2011, passed by the Commissioner of Customs, Pune. Aggrieved by the Order-in-Original, the respondent filed an appeal before CESTAT, Mumbai which was decided on 12.04.2012 by way of remand for reconsideration of the original adjudicating authority afresh and to consider the claim of M/s Cummins India Ltd. under Rule 7 ibid.

2.2 On 22.03.2011, the respondents filed supplementary drawback claim for the period from May, 2005 to February, 2010 with the Deputy Commissioner of Customs, Drawback Department, ICD, Dighi, under Rule 15 ibid, claiming an amount of Rs.1,53,69,337.34. The contention of the respondent is that the department had taken into account for the purpose of computation and working of alleged excess payment of drawback, only those shipping bills wherein the drawback sanctioned to the petitioner under Rule 6 was more than the drawback allowable under Rule 3 (All Industry rate of drawback). According to them, drawback sanctioned to them in respect of certain shipping bills under Rule 6 was less than the drawback allowable to them under Rule 3 and in such case, the supplementary drawback claims were filed by the respondents. The Assistant Commissioner of Customs, ICD (Dighi) rejected

the claims on the ground that the supplementary claims were time barred and also on the ground that the Order-in-Original No.31/2010-11 dated 21.03.2011 passed by Commissioner of Customs and Central Excise, Pune did not cover drawback claims pertaining to the Shipping Bill covered in supplementary claim.

3. Aggrieved of the above rejection by the Assistant Commissioner, the respondent filed appeal before the Commissioner (Appeals) and the same was allowed vide impugned Order-in-Appeal dated 09.11.2011 in favour of respondent. The Commissioner (Appeals) allowed the appeal by referring to Rule 17 ibid holding that claim cannot be held as time barred and directed the lower authority to admit the claim and process it as per law. Aggrieved by the same, Department filed Revision Application No.380/04/DBK/12-RA and the revisionary authority decided the said application vide Revision Order No.441/12-Cus dated 17.12.2012 setting aside the Order-in-Appeal and restoring the impugned Order-in-Original. Aggrieved by the said Revision Order, M/s Cummins India filed the Writ Petition No.8588 of 2013 in Hon'ble High Court, Bombay. The Hon'ble High Court vide order dated 15.12.2014 set aside the order passed by the Revisionary Authority and restored the Application to Revisionary Authority for fresh decision and in accordance with the law and also to decide whether the order passed by the Commissioner (Appeals) specifically referring to Rule 17 is legal and proper or not.

4. The applicant department had filed the aforesaid Revision Application under Section 129DD of Customs Act, 1962 before Central Government on the following grounds:

4.1 The exporters have received drawback at the rate under Rule 6 as per brand rate letters issued by the jurisdictional Central Excise Commissionerate from time to time. No supplementary claim was ever filed by them before adjudication order was passed on 21.03.2011 for Shipping Bills pertaining to the year 2005, 2006 and 2007 etc. It was only after the order was passed by the Commissioner that the exporters suddenly realized that the amount received by them through Brand rate letters is less than the All Industry Rate; this prompted them to file supplementary drawback claim in March 2011. This shows that the supplementary claims have not been filed within the time limit stipulated by the Drawback Rules and so rightly rejected.

4.2 In the letter dated 01.06.2011 issued by Assistant Commissioner, Customs, Dighi, rejecting the supplementary claims, it has been categorically mentioned that the Shipping Bills for which the supplementary claims have been filed by the exporters are not covered under the Show Cause Notices and Order-in-Original No. 31/2011 dated 21.03.2011. The Order-in-Original is in fact for recovery of drawback under Rule 16 of the Drawback Rules which was paid in excess of the All Industry Rate under Rule 3.

4.3 The said Order-in-Original does not relate to the settlement of drawback claims - either by way of All Industry Rate (Rule 3) or Brand Rate (Rule 6). The said order has nothing to do with the rejection of the original drawback claims (for Shipping Bills pertaining to 2005 to 2007 etc.) and hence, the date of Order-in-Original (21.03.2011) cannot be taken as the relevant date for finalization of the drawback claims.

4.4 The Commissioner (Appeals) in his order has held that the respondent has given a reason for filing supplementary claim in terms of Rule 17 of the Drawback Rules read with CBEC Circular No. 82/98-Cus dated 29.10.1998. In this regard it is to be noted that the Circular relates to the subject of condonation of delay in filing application for fixation of Brand Rate under the Customs and Central Excise Duty Drawback rules, 1971/1975. The said Circular has no relevance to the condonation of delay in filing of the supplementary drawback claims and hence, appears to have been wrongly quoted in this case.

4.5 Commissioner (Appeals) has referred to the provisions of Rule 17 of the Drawback Rules, which is reproduced below:-

"17. Power to relax. - If the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorized agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback, it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods."

While rejecting the supplementary claims, the provisions of Rule 17 have been carefully considered vis-a-vis the representations and reasons submitted by the exporter. However, the very fact that the Shipping Bills pertaining to the years 2005, 2006 and 2007 etc. were presented for supplementary claims in the year 2011 was beyond the scope of any relaxation in the time limit stipulated for submission of supplementary claim. Further Rule 17 empowers only the Central Government to grant any relaxation/condonation to the exporter. In view of the above facts of the case, it will be incorrect to hold the date of the Order-in-Original i.e. 21.03.2011 as the relevant date for filing supplementary claims or within three months of that date as claimed by the exporters. Therefore, the Order-in-Appeal No.GOA/CUS/GSK/57/2011 dated 09.11.2011 passed by the Commissioner (Appeals) to the effect that the supplementary claims filed by the exporters be admitted and processed, appears to be not just, proper and hence, the same may be set aside by the Central Government. The period of limitation for filing the supplementary claim be reckoned as being three months from the date of payment or settlement of the original claims of drawback by the proper officer under proviso (iii) to Rule 15(1) of the Drawback Rules, 1995.

5. Show Cause Notice was issued to the respondent under Section 129 DD of Customs Act, 1962 to file their counter reply. The respondent vide their letter dated 18.05.2012 has made the following cross-objections:-

5.1 The respondents were issued the Brand Rate of duty drawback on the basis of which the respondents were sanctioned with drawback. The Commissioner of Customs, Pune vide Order dated 21.03.2011 has held that the respondents are entitled for drawback under all industry rate of drawback only. However, the Commissioner has not considered those cases where the drawback already granted under Rule 6 was lower than the all industry rate of drawback otherwise admissible them, as held by the Commissioner. The respondents submit that the department should have granted drawback under all industry rate of drawback, even in respect of those export in respect of which, no recovery proceeding were initiated. The said submission is based on the decision of Supreme Court in Unichem Laboratories Ltd. Vs. Collector- 2002 (145) ELT 502(SC). Since the Commissioner while adjudicating the 3 Show Cause Notices, did not consider the submission of the respondent that they are entitled to drawback under Rule 3 (i.e. under All Industry Rate of Drawback) to the tune of Rs. 1,53,69,337/-, the respondents filed the supplementary claim under Rule 15. It is submitted that the supplementary claim filed by the respondents under Rule 15 cannot be treated as time barred.

5.2 Without prejudice, extension of period for supplementary drawback claims may be granted under Rule 17. It is well settled law that the department cannot take advantage of its own wrong. If the department had raised the objection that the respondents were not entitled for drawback under Rule 6 within the reasonable period, then the respondents could not have either claimed the drawback under Rule 3 or could have made the application in terms of Rule 15, within the time specified in Rule 15.

5.3 Without prejudice, the respondents, submit even if the department is of the view that there is delay in filing the supplementary claims, in view of the powers conferred under Rule 17 the same may be condoned. Therefore, the respondents pray that in terms of power conferred under Rule 17, the Joint Secretary may condone the delay in filing the supplementary claim and hold that the respondents are entitled to drawback of Rs. 1,53,69,337/-. That Rule 17 can be invoked for extending the time limit in filing the claim is supported by the Circular No. 82/98-Cus dated 29.10.1998 issued by the Board. Therefore, in the present case also, the respondents have filed the supplementary claim well within 90 days from the order dated 21.03.2011 passed by the Commissioner of Customs holding that the respondents are entitled for drawback only under Rule 3, i.e.. All Industry Rate of Drawback. Hence, the application filed by the respondents cannot be treated as time barred.

5.4 The order dated 21.03.2011 passed by the Commissioner, in fact, categorically holds that the respondents are entitled to drawback in terms of Rule 3 alone. That being so, in respect of all exports made by the respondents during the period, there is a determination of drawback by the Commissioner vides order dated 21.03.2011. It is a different matter that in respect of the exports covered by the supplementary claim no recovery is proposed since in respect of those exports covered by the supplementary claim, the drawback sanctioned was lower than the drawback available under Rule 3. Hence, Supplementary claim dated 22.03.2011 is not time barred. Department is travelling beyond scope of order dated 01.06.2011 and is not following object of the Drawback schemes.

6. In compliance of Hon'ble High Court's Order dated 15.12.2014 received on 24.06.2015, personal hearing in this case was fixed on 12.08.2015, 18.08.2015 and 25.08.2015.

6.1 Hearing held on 12.08.15 was attended by Shri Rajat Doshi, Senior Associate, Lakshmi Kumaran and Sridharan on behalf of respondent. During the course of hearing, the respondent stated that the supplementary claim has arisen out of Commissioner's order dated 21.03.2011 and therefore relevant date under Rule 15(1) proviso (iii) will be date of settlement of original drawback claim viz 21.03.2011 and not date of disbursement of drawback; that referring to Hon'ble Court's order, the Revisionary Authority is now required to settle the issue of condonation of delay under Rule 17 of the Drawback Rules. They also relied upon CBEC's Circular 82/98-Cus dated 29.10.1998 Sr.No.1 of Annex and Circular 4/2000-Cus dated 12.01.2000 Sr.No.11 and stated that period of condonation beyond the period permitted under Rule 6/7 is 90 days from date of rejection of claim and their case is squarely covered under the reason for delay given therein.

6.2 Shri Ashish Kutti, Asstt. Commissioner of Customs, Pune attended the hearing on 25.08.2015 on behalf of the applicant department. The applicant department reiterated grounds of Revision Application and stressed that it is a clear case of mis-declaration and the exporter was very well aware that All Industry Rate existed but applied for Brand Rate fixation. The Department further vide their written submission dated 12.08.2015 mainly stated as under:

6.2.1 M/s Cummins India Ltd. are the manufacturers of IC Engines and parts thereof falling under Tariff Item No.8408. From May 2005 to February 2010, they exported these products and claimed drawback by filing Shipping Bills under advance licenses and drawback scheme for claiming drawback against the brand rate letters issued under Rule 6(1)(a) of the Drawback Rules, 1995. The department had issued three Show Cause Notices dated 04.10.2010, 25.11.2010 and 03.12.2010 for demand of excess drawback sanctioned and these Show Cause Notices were adjudicated by a common Order-in-Original dated 21.03.2011 by the Commissioner of Customs.

Aggrieved by the Order in Original, the petitioner had filed an appeal before CESTAT, Mumbai. The said Appeal was decided on 12.04.2012 by way of remand for reconsideration of the original adjudicating authority. The contention of the petitioner is that the department had taken into account for the purpose of computation and working of alleged excess payment of drawback, only those shipping bills wherein the drawback sanctioned to the petitioner under Rule 6 was more than the drawback allowable under Rule 3 (All Industry rate of drawback). According to them, drawback sanctioned to them in respect of certain shipping bills under Rule 6 was less than the drawback allowable to them under Rule 3 on the FOB value mentioned in the 'respective' shipping bills and the supplementary drawback claims were filed. The Assistant Commissioner, Customs, Dighi rejected the claim vide letter dated 01.06.2011 on the ground that the supplementary claim is time barred. Aggrieved by this order appeal was filed before the Commissioner (Appeals) and the same was allowed on 09.11.2011. Aggrieved by the same, department filed R.A before Joint Secretary. The Revision Application set aside the order of the Commissioner (Appeals) and allowed the Revision Application. Aggrieved by the same M/s Cummins India filed the W.P. in Hon'ble High Court, Bombay. The Hon'ble High Court vide order dated 15.12.2015/20.05.2015 set aside the order passed by the Revision Authority for being decided afresh and in accordance with the law and to decide whether the order passed by the Commissioner (Appeals) specifically referring to Rule 17 is legal or proper.

6.2.2 The matter is kept open now by the Hon'ble High Court to argue the same before the Revisional Authority. However it is pertinent to note that the issue is whether the Supplementary claim filed by the petitioner is within time limit from the date of Order of the Commissioner, i.e. 21.3.2011 and whether the date of Order of the Commissioner which does not pertain to this issue can be considered as relevant date. It is a fact that this date cannot be taken as the date for filing supplementary claim for Shipping Bills pertaining to the year 2005 to 2007. Since the date of order of the Commissioner cannot be considered as the relevant date, the question of condoning the delay beyond 30 days does not arise. It is observed that the subject Show Cause Notices and the Order-in-Original No. 31/2011 passed by the Commissioner does not cover claims for drawback against export of goods under cover of shipping bills included in the instant supplementary claims. The said Order of the Commissioner covers recovery of drawback of excess amount of drawback sanctioned and paid. Therefore the grounds adduced for supplementary claims are misconceived.

6.2.3 The Assistant Commissioner has categorically mentioned in his Order dated 01.06.2011 that the Shipping Bills for which the supplementary claims have been filed by the exporters are not covered under the Show Cause Notices and the Order in Original No.31/2011 dated 21.03.2011. The Order in Original is in fact for recovery of

drawback under Rule 16 of the Drawback Rules which was paid in excess of the All Industry Rate under Rule 3. The said Order in Original does not refer to the settlement of Drawback claims either by way of All Industry Rate (Rule 3) or Brand Rate (Rule 6). The said order has nothing to do with the rejection of the original drawback claim (for Shipping Bills pertaining to 2005-2007 etc.) and hence the date of Order-in-Original 21.03.2011 cannot be taken as the relevant date for finalisation of the supplementary drawback claims. This fact has not been considered by the Commissioner (Appeals) in his order. In fact the petitioner should have filed the claims within three months from the original order of settlement of drawback claims with request to condone the delay.

6.2.4 In fact the petitioner has filed the claim with an intention that the claim is within the time limit. They have not come forward with application for condonation of delay. There should be sufficient ground to condone the delay. When the petitioner was having knowledge that they have received less drawback, then they should have come forward with the supplementary claim within the time prescribed with specific grounds. However, the grounds put forth by the petitioner are not sufficient and therefore there is no question of condonation of delay and the power to relax under Rule 17 cannot be exercised. Now the matter to be reconsidered by the Revisionary Authority is to whether the power to relax under Rule 17 has been invoked and if invoked before him, could the power be exercised at the stage at which the matter is brought before him.

6.2.5 It is the contention of the department that the petitioner have not brought any evidence in support of his application for condonation of delay. Rule 17 should have been invoked at the time of filing the supplementary drawback claim. The Petitioner have stated that the claim is within time limit as it is filed within three months from the date of order of the Commissioner. The date of order in original 21.03.2011 cannot be taken as the relevant date for finalisation of the drawback claim. Therefore the provisions of Rule 17 cannot be invoked. Rule 15 of Drawback Rules, 1995 specifically provides for the supplementary claim within three months where any exporter finds that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount or rate of drawback determined by the Central Government or Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, he may prefer a supplementary claim. In the instant case as the claim is not filed within three months from the date of sanction of the original claim and there is no request application for condonation of delay from the petitioner to the original draw back sanctioning authority, the question of condonation of delay does not arise at a later stage. The petitioner has to put forth the grounds which are beyond their control for delay in submission of supplementary claims and the original sanctioning authority has to consider the same. If the original drawback sanctioning authority fails to consider the request for condonation, then

only the petitioner has an option to approach higher Central Government Authority for relaxation of the same under Rule 17.

7. Government has gone through records of the case and also perused the impugned orders and the Order of the Hon'ble High Court dated 15.12.2014.

8. Upon perusal of records, Government observes that Hon'ble High Court has noted in its order that the facts of the case given in the revision order are not disputed. In the instant case the applicant exported the goods under claim of drawback and filed application for fixation of brand rate of drawback, which was subsequently fixed under Rule 6 of Drawback of Customs, Central Excise Duties and Service Tax Rules, 1995 and accordingly drawback was sanctioned to them. Subsequently, it was noticed that All Industry Drawback rate was already notified for impugned goods under Rule 3 of the Rules and consequently proceedings were initiated for recovery of excess drawback paid under Rule 6. The Show Cause Notices were adjudicated vide a common order no.31/2010-11 dated 21.03.2011, passed by the Commissioner of Customs, Pune wherein recovery of excess paid drawback has been confirmed and penalty imposed on the respondent company. This order was set aside by the CESTAT vide order dated 12.04.2012 and remanded back to the adjudicating authority for reconsidering the claim for sanction of drawback under Rule 7 *ibid*. Subsequent to order No.31/2010-11 dated 21.03.2011, the respondent filed supplementary claim of drawback on 22.03.2011 on the ground that by virtue of the said order, they have received lesser amount of drawback under fixation of brand rate of drawback under Rule 6 as against eligibility of drawback under All Industry Rate under Rule 3. These supplementary claims were rejected as time barred by the original authority. Upon appeal by the respondent, Commissioner (Appeals) decided the cases in favour of the respondent. Aggrieved by the same, department filed Revision Application No.380/04/DBK.12-RA before Joint Secretary(RA) on grounds stated in para 4. The Revisionary Authority decided the said Application vide Revision Order No.441/12-Cus and allowed the department's Revision Application. Aggrieved by the said Revision Order, M/s Cummins India filed the Writ Petition No.8588 of 2013 in Hon'ble High Court, Bombay. The Hon'ble High Court vide order dated 15.12.2014 quashed and set aside the order passed by the Revisionary Authority and remanded the same for being decided afresh and in accordance with the law and to decide whether the order passed by the Commissioner (Appeals) specifically referring to Rule 17 is legal and proper or not.

9. In this regard, Government notes that there are two issues which are to be primarily addressed and answered in this case for the purpose of revision as per directions of the Hon'ble High Court. These are:

(a) Whether the supplementary drawback claim filed under Rule 15 of the Drawback Rules, 1995 by M/s Cummins India Ltd. is hit by limitation or not.

(b) Whether limitation period for filing supplementary drawback claim under Rule 15 ibid can be relaxed by exercise of authority under Rule 17 ibid.

10. Government now proceeds to address each issue. In order to understand the issue at (a) above, the provision of Rule 15 ibid are perused, which are as under :

"Rule 15. Supplementary Claim. - (1) Where any exporter finds that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount or rate of drawback determined by the Central Government or Commissioner of Central Excise or the Commissioner of Customs and Central Excise, as the case may be, he may prefer a supplementary claim in the form at Annexure III.

Provided that the exporter shall prefer such supplementary claim within a period of three months, -

(i) where the rate of drawback is determined or revised under Rule 3 or Rule 4, from the date of publication of such rate in the official Gazette;

(ii) where the rate of drawback is determined or revised upward under Rule 6 or Rule 7, from the date of communicating the said rate to the person concerned;

(iii) in all other cases, from the date of payment or settlement of the original drawback claim by the proper officer:

Provided further that the aforesaid period of three months may be extended by the Assistant Commissioner of Customs or Deputy Commissioner of Customs for a further period of nine months on being satisfied that the exporter was prevented by sufficient cause from filing his supplementary claim within the aforesaid period of three months.

(2) Save as otherwise provided in this rule, no supplementary claim for drawback shall be entertained.

(3) The date of filing of the supplementary claim for the purpose of Section 75A shall be the date of affixing the dated receipt stamp on such claims which are complete in all respects and for which an acknowledgement shall be issued in the form prescribed by the Commissioner of Customs.

(4) (a) Claims which are not complete in all respects or are not accompanied by the required documents shall be returned to the claimant with a deficiency memo in the form prescribed by the Commissioner of Customs within fifteen days of submission and shall be deemed not to have been filed.

(b) Where the exporter resubmits the supplementary claim after complying with the requirements specified in the deficiency memo, the same will be treated as a claim filed under sub-rule (1) for the purpose of Section 75A."

11. It is fact on record that the relevant date for determination of the period of limitation in the present case would be arrived at in terms of proviso (iii) to Rule 15(1) *ibid* i.e. from the date of payment or settlement of the original drawback claim by the proper officer. The proper officer in this case is the Assistant Commissioner/Deputy Commissioner of Customs and the claim was settled based on the brand rate fixed.

12. The said provisions also stipulate that supplementary drawback claim is to be filed within 3 months of payment or settlement of the original drawback claim by proper officer. This period of 3 months can be extended by Assistant Commissioner/Deputy Commissioner of Customs for a further period of 9 months on being satisfied that exporter was prevented by sufficient cause from filing claim in time. There is no provision in statute for further extension thereof. In this case, the original authority settled the drawback claim based on brand rate fixation in the years 2006 to 2010 and supplementary claim was admittedly filed only on 22.03.2011. The Assistant Commissioner/Deputy Commissioner of Customs is empowered to condone delay upto 9 months only. In any case, admittedly no such request for condonation of delay was filed by the respondent. So the claim was clearly hit by time limitation.

13. Government further finds that the contention of the respondent that the relevant date under Rule 15(1) proviso (iii) would be the date of passing of Order-in-Original dated 21.03.2011 by Commissioner of Customs, Pune is not tenable.

13.1 It is a fact on record that the said order is restricted to the issue of recovery under Rule 16 *ibid* of erroneous drawback claimed by the exporter by mis-declaration. Moreover, the demand notices decided by the said order did not relate to the exports made by the Shipping Bills for which supplementary claim has been filed. The said order neither settles any drawback claim either by way of All Industry Rate or Brand Rate nor deals with rejection of the original drawback claims for the Shipping Bills under consideration. Hence, in terms of Rule 15 *ibid*, the date of the Order-in-Original i.e. 21.03.2011 cannot be taken as the relevant date for the purpose of supplementary claim as this was an unrelated proceeding.

13.2 Further, in the third para of the last page of Order-in-Appeal under revision, Commissioner (Appeals) has clearly noted that the reason given by the respondent for their supplementary claim was that "though there is All Industry Rate for our Export product, we had made an application for Brand Rate of Drawback under Rule 6." This shows that the respondent was always aware that All Industry Rate was available for their product. Hence, they cannot now assert that their claim was settled only by the proceedings which concluded on 21.03.2011. It was incumbent upon the respondent to correctly and carefully claim and avail the benefit of drawback in terms of the provisions applicable and within the prescribed time limit.

14. Government further observes that just as there are specific statutory provisions for recovery of erroneous drawback by the Government under Rule 16, there are also specific provisions for claim by the exporter of lesser amount of drawback received under Rule 15 *ibid*.

14.1 Rule 16 *ibid* provides for repayment of erroneous or excess payment of drawback. Thus for those Shipping bills where the respondent was paid excess drawback, demand notices were issued and confirmed vide Order-in-Original No. 31/2010-11 dated 21.03.2011 seeking repayment of excess amount of drawback paid.

14.2 Rule 15 *ibid* on the other hand enables the exporter to file supplementary claims in three specified circumstances where the amount of drawback paid to him is less, subject to fulfillment of conditions therein. One such condition is the time period within which such claim can be filed.

14.3 The above two rules are mutually exclusive and it cannot be held in the present case that proceedings under Rule 16 *ibid* which culminated in Order No.31/2010-11 dated 21.03.2011 was the causal factor for filing of supplementary claim under Rule 15 *ibid*.

15. Government observes that the respondent in support of its contention has also relied on CBEC's Circulars 82/98-Cus dated 29.10.1998(Sr. No.1 of Annexure) and 4/2000-Cus dated 12.01.2000. Circular 82/98 at Sr. No.1 of the Annexure deals with a scenario where applicant's claim is rejected by Original/Appellate authority as not admissible under All Industry Rate and thereafter the exporter needs to file application for fixation of brand rate. In the present case, the drawback claim was not *per se* rejected by either the sanctioning or appellate authority. Circular 4/2000-Cus applies to cases where drawback under Section 74 has been rejected and exporter is advised to file it under Section 75. Thus both the Circulars are found to be inapplicable to the present case.

16. Therefore, Government finds that in the present case, the relevant date for the purpose of limitation under Rule 15 *ibid* is the date of settlement and payment of original drawback claims by the proper officer and not the date of Order-in-Original No. 31/2010-11 dated 21.03.2011 as passed by the Commissioner for recovery of excess drawback paid. As the claims were not filed within three months from the respective date of settlement of the original claims, the supplementary claims have rightly been held as time barred by the original authority in the impugned Orders-in-Original dated 01.06.2011.

17. Government observes that it is an undisputed fact that the claimant at the time of filing supplementary claim before the original authority did not seek any condonation of delay. It was only before the Commissioner (Appeals) that they

sought relaxation of time limit under Rule 17 *ibid* which was allowed by the impugned Order-in-Appeal. Even before the revisionary authority, the applicant held that their claim was not time barred and also canvassed on the alternative and without prejudice seeking relaxation under Rule 17. Before the Hon'ble High Court they have conceded that their case may not fall strictly in Rule 15 but the time limit could have been relaxed by the Government in alternative and without prejudice under Rule 17.

18. In light of the factual position as above, Government now proceeds to examine the second issue at (b) in para 9 above regarding the applicability of Rule 17 *ibid* in the present case.

19. Government notes that the Rule 17 *ibid* reads as under:

"Power to relax. - If the Central Government is satisfied that in relation to the export of any goods, the exporter or his authorised agent has, for reasons beyond his control, failed to comply with any of the provisions of these rules, and has thus been entitled to drawback, it may, after considering the representation, if any, made by such exporter or agent, and for reasons to be recorded in writing, exempt such exporter or agent from the provisions of such rule and allow drawback in respect of such goods."

The above Rule spells out the power of the Central Government to relax the provisions contained in the Drawback Rules for reasons beyond the control of any exporter and allow drawback, subject to the requirements stipulated therein.

20. Central Government is an entity which comprises separate and distinct arms through which it discharges its multifarious functions. The term does not necessarily refer to a single authority. Further, the respective authorities discharge their functions only as per the specific statutory provisions, which as a general rule cannot be exercised inter-changeably. Under the Customs Act, 1962 or Rules issued thereunder also, the Central Government's powers are exercised by different authorities based among other on the executive or quasi-judicial function being performed.

21. The powers of revision of the Central Government under the Customs Act 1962 are prescribed under Section 129DD, which reads as below:

"Revision by Central Government - (1) *The Central Government may, on the application of any person aggrieved by any order passed under section 128A, where the order is of the nature referred to in the first proviso to sub-section (1) of section 129A, annul or modify such order.*

Provided that the Central Government may in its discretion, refuse to admit an application in respect of an order where the amount of duty or fine or penalty, determined by such order does not exceed five thousand rupees.

Explanation - For the purposes of this sub-section, "order passed under section 128A" includes an order passed under that section before the commencement of section 40 of the Finance Act, 1984, against which an appeal has not been preferred before such commencement and could have been, if the said section had not come into force, preferred after such commencement, to the Appellate Tribunal.

(1A) The Commissioner of Customs may, if he is of the opinion that an order passed by the Commissioner (Appeals) under section 128A is not legal or proper, direct the proper officer to make an application on his behalf to the Central Government for revision of such order.

(2) An application under sub-section (1) shall be made within three months from the date of the communication to the applicant of the order against which the application is being made:

Provided that the Central Government may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the aforesaid period of three months, allow it to be presented within a further period of three months.

(3) An application under sub-section (1) shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf and shall be accompanied by a fee of -

(a) two hundred rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is one lakh rupees or less;

(b) one thousand rupees, where the amount of duty and interest demanded, fine or penalty levied by an officer of customs in the case to which the application relates is more than one lakh rupees :

Provided that no such fee shall be payable in the case of an application referred to in sub-section (1A).

(4) The Central Government may, of its own motion, annul or modify any order referred to in sub-section (1).

(5) No order enhancing any penalty or fine in lieu of confiscation or confiscating goods of greater value shall be passed under this section, -

(a) in any case in which an order passed under section 128A has enhanced any penalty or fine in lieu of confiscation or has confiscated goods of greater value, and

(b) in any other case, unless the person affected by the proposed order has been given notice to show cause against it within one year from the date of the order sought to be annulled or modified.

(6) *Where the Central Government is of opinion that any duty of customs has not been levied or has been short-levied, no order levying or enhancing the duty shall be made under this section unless the person affected by the proposed order is given notice to show cause against it within the time limit specified in section 28.*"

22. From a perusal of the above Section, Government observes that the revisionary powers are specific, quasi-judicial in nature and restricted to the confines of the Section i.e. to be exercised through the revisionary authority only in cases of orders passed by Commissioner (Appeals) under Section 128A of the Act with reference to cases as specified in the first proviso to sub-section (1) of Section 129A. The fact that Government under Section 129DD performs quasi-judicial function is further reinforced by Hon'ble Supreme Court's judgement in the case of Indo-China Stream Navigation Co. Ltd. Vs. Jasjit Singh, Additional Commissioner of Customs 1983(013) ELT 1392(SC) wherein it has been held that status of a Tribunal is accorded to the Central Government in its capacity as a revisionary authority.

23. Therefore, Government holds that the powers given under Rule 17 *ibid* are beyond the scope of powers to be exercised under Section 129DD of the Act. As such mention of Central Government in Rule 17 *ibid* does not refer to Joint Secretary, Revision Application or empower him on behalf of Central Government for the purpose of Rule 17 *ibid*.

24. Government further notes that the following case laws lend support to the view that the power to grant relaxation under Rule 17 does not vest with the Revisionary Authority.

24.1 The Hon'ble High Court of Bombay at Panaji in the case of IFB Industries Ltd Vs. Union of India 2007(215) ELT 497 (Bom.) has held as under:

"2. This petition impugns an order passed by Respondent No.4 and seeks declaration that the said order is nullity. It seeks further direction to the competent authority to decide the matter in dispute, after granting personal hearing in accordance with the direction given by this Court in terms of prayer (b) to the earlier petition, filed by the petitioner in this Court, being Writ Petition No. 398 of 2006. Earlier petition bearing Writ Petition No. 398 of 2006 [2007 (211) E.L.T. 366 (Bom.)] was disposed of at the stage of admission by an order of the Division Bench of this Court dated 06.11.2006. Subject matter of the said petition pertained to the rejection of an application for fixation of Brand Rate of duty drawback under Rule 6(1)(a) of the Customs and Central Excise Duties Drawback Rules, 1995. It was the contention of the Petitioner that in the earlier petition, Respondent No.2 i.e. Joint Secretary (Drawback), the Directorate of Drawback, Ministry of Finance was the competent authority

vested with the powers to condone delay in filing of such an application and in spite of such application being made to him, the Respondent No.4 had wrongly passed the impugned order dated 12.02.2007. It appears that at the stage of hearing for admission, Central Government Standing Counsel appearing for Respondents No.1, 3, 4 and 5 in the said petition had submitted that if this Court so directed, the competent authority would hear the petitioner's application afresh for condonation of delay and pass appropriate orders. The petition was therefore allowed in terms of prayer clause (b) which reads as under:

"In the alternative this Honourable Court may be pleased to set aside the order conveying rejection of the petitioners' request for condonation of delay and direct the competent authority by a writ of mandamus or any other writ or direction or order to hear and decide such request afresh after granting a personal hearing."

3. The competent authority was directed to dispose of the application for condonation of delay within a period of three months. It appears that after the judgment of High Court in the earlier Writ Petition, the papers were sent to the competent authority. Instead of deciding the matter of condonation of delay afresh the competent authority vide letters dated 22.12.2006 and 15.01.2007, without hearing the petitioner, communicated certain directions to the present Respondent No.4. The said directions are reproduced in paragraph three of the impugned order dated 12.02.2007 and from the same, it is evident that the competent authority has decided the matter relating to condonation of delay against the petitioner on merits.

4. The procedure followed by the competent authority is not correct and is also not in accordance with the directions given by this Court. In fact, if such directions were given to the subordinate officer, then the said officer would have no discretion except to act in accordance with the directions given to him and this is exactly what he has done while passing order dated 12.02.2007. Needless to say that the hearing given by Respondent No.4 to the petitioner, was not a hearing given by the competent authority as contemplated by the judgment and order passed by this Court in the earlier Writ Petition.

5. In the circumstances, Rule is made absolute in terms of prayer clause (a) of this petition. It is directed that the competent authority will give a hearing to the petitioner and will decide the Petitioner's application for condonation of delay dated 09.11.2005".

24.2 The Hon'ble CESTAT in the case of Kuber Engineering Enterprise Vs. Commissioner of Central Excise, Kolkata-III 2009(234) ELT 542 (Tri. Kolkata) and in

the case of Process Equipments and Vessels Eng. Co. Ltd Vs. Commissioner of Central Excise, Kolkata – III 2009 (233) ELT 538 (Tri.Kolkata) held that :

"What the Appellants are seeking is the Central Government's power to relax, under Rule 17 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, the period of delay in submitting the Brand Rate Application. Such an Application for relaxation under Rule 17 should be submitted by the Appellants to the Central Government through the Joint Secretary, Drawback in the Ministry".

24.3 Further, the Revisionary Authority while holding supplementary drawback claim filed after 17 months from date of settling of claim as hit by limitation in the case of Steel Authority of India 2014 (311) ELT 1016 (GOI) had held as under:

"The respondent has finally argued that Central Government may condone the delay in terms of Rule 17 of Drawback Rules. In this regard, Government observes that respondent was required to seek such condonation of delay from designated proper authority in Central Government. Respondent has not produced any such condonation of delay approval from competent designated authority and therefore no relief can be granted by revisionary authority who is exercising powers only under Section 129 DD of Customs Act, 1962".

24.4 The above case laws thus also establish that the Central Government's power to relax under Rule 17 *ibid* can only be exercised through the Joint Secretary, Drawback, in the Ministry and not the revisionary authority.

25. Further, Government observes that the Commissioner (Appeals) exercises quasi-judicial authority under Section 128A of the Customs Act, 1962 being the first level of appeal against orders passed by officers lower in rank than a Commissioner of Customs. It would thus be beyond the scope of the powers conferred by the said Section for the Commissioner (Appeals) to exercise authority under a Section or a Rule for which he is not empowered. Hence, Government holds that in allowing relaxation under Rule 17 *ibid*, the Commissioner (Appeals) has exceeded his statutory jurisdiction.

26. Government also holds that the provisions of Rule 17 *ibid* cannot be invoked either at the stage of Commissioner (Appeals) or in the present proceedings in Revision. In the present case, it is a fact on record that there is no condonation of delay application either before original authority under Rule 15 or such a representation before the competent authority under Rule 17. Relaxation under Rule 17 should have been invoked before the competent authority prior to filing of supplementary claim. The respondent has not produced any condonation of delay from the competent designated authority. Moreover, no relief under Rule 17 can be

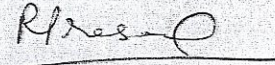
given by the Commissioner (Appeals) or by the revisionary authority who are circumscribed by way of exercise of their powers under Sections 128A and 129 DD of the Customs Act, 1962 respectively.

27. In view of the above discussion, Government finds force in the pleading of the applicant department and holds that the supplementary drawback claim was clearly time barred in terms of Rule 15 ~~ibid~~; and Commissioner (Appeals)'s order is not just and proper in holding that the claim cannot be treated as time barred in reference to Rule 17 and has erred in directing the lower authority to admit the claim and process it as per law.

28. Therefore, in view of the above position, Government sets aside the impugned Order-in-Appeal and restores the Order-in-Original.

29. The revision application thus succeeds in terms of above.

30. So ordered.



(Rimjhim Prasad)

Joint Secretary to the Government of India

Commissioner of Customs, Pune
'B' Wing, 4th Floor, ICE House
Sassoon Road
Pune-411001.

Attested.

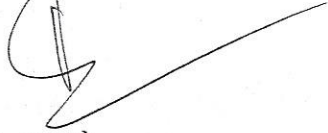
(Signature)
सह (असिस्टेंट) जर्नल/असिस्टेंट कमिश्नर
CBE C.O. (Asstt. Commr. (Asstt. Commr.))
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली/New Delhi

GOI ORDER NO. 25/2015-CUS DATED 22.09.2015

Copy to:

1. M/s Cummins India Ltd., Kothrud, Pune, Maharashtra-411038.
2. Commissioner (Appeals), Central Excise, Customs and Service Tax, Goa.
3. Assistant Commissioner of Customs, ICD, Dighi, Talera Nagar, Alandi Road,
Pune-411 015.
4. Guard File.
- ✓ 5. PA to JS (RA).
6. Spare Copy.

ATTESTED


(B.P.Sharma)
OSD (Revision Application)

