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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No.371/311-341/DBK/2022-RA 1390 Date of Issue: 03.03.2023
F. No.371/450-484/DBK/2022-RA

ORDER NO 375-390 /2023-CUS (WZ) /ASRA/Mumbai DATED 02.2023 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	:	M/s Nayara Energy Limited, (Formerly known as M/s Essar Oil Limited) P.O. Box 24, Khambhaliya, Dist. Devbhumi, Jamnagar.
Respondent	:	Commissioner of Customs (Preventive), Jamnagar.
Subject	:	Revision Applications filed under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No.JMN-CUSTM-000-APP-59-89-21-22 and No.JMN-CUSTM-000-APP-79-113-22-23 dated 17.03.2022 and 29.07.2022, respectively, passed by the Commissioner (Appeals), Customs, Ahmedabad.

ORDER

These Revision Applications have been by filed M/s Nayara Energy Limited, formerly known as Essar Oil Limited (here-in-after referred to as 'the applicant') against the Orders-in-Appeal No.JMN-CUSTM-000-APP-59-89-21-22 and No.JMN-CUSTM-000-APP-79-113-22-23 dated 17.03.2022 and 29.07.2022, respectively, passed by the Commissioner (Appeals), Customs, Ahmedabad. The Order-in-Appeal dated 17.03.2022 decided appeals filed by the applicant against 31 Brand Rate Fixation Orders and Order-in-Appeal dated 29.07.2022 decided appeals filed by the applicant against 35 Brand Rate Fixation Orders, all passed by the Additional Commissioner, Customs Commissionerate (Preventive), Jamnagar. The issue involved in both the impugned Orders-in-Appeal being identical, the same are taken up for decision together.

2. Brief facts of the case are that the applicant exported petroleum products manufactured by them under claim of duty Drawback, using both imported and indigenously procured crude oil. They filed applications for fixation of brand rate of drawback along copy of Cost Sheet certified by independent Chartered Accountant and calculation of amount of brand rate of duty drawback. The original authority requested them to submit the exact quantum of excise duty suffered by them and the duty structure on indigenously procured raw material. The applicant informed that they had received no response from their supplier to their request for supply of evidence of the duties paid and to avoid delay in fixing the brand rate, they requested the original authority to fix the same in respect of imported crude oil only. The applicant further submitted that they had entered into a long term purchase contract with M/s Vedanta Limited from whom they procured crude oil indigenously against a commercial invoice wherein the value indicated was all inclusive price, i.e. including all duties and taxes. They further submitted that NCCD had specific rate of duty @ Rs.400/- PMT and hence the same could be calculated on the basis of consumption and no further evidence was required. The original authority, in both the above mentioned Orders-in-Original, held that while seeking fixation of brand rate of Drawback the appellant was under obligation to provide particulars of duty incidence suffered by them and in the absence of the same, it was not

possible to factor the quantum of NCCD suffered, if any, on the indigenously procured Crude Oil to compute the brand rate of Drawback. Aggrieved, the applicant filed appeals before the Commissioner (Appeals) against the said 66 Brand fixation letters issued by the original authority. The Commissioner (Appeals), in both the impugned Orders-in-Appeal, upheld he decisions of the original authority and rejected the appeals preferred by the applicant.

3. Aggrieved by the impugned Orders-in-Appeal dated 17.03.2022 and 29.07.2022, the applicant has filed the present Revision Applications. The grounds on which they have been preferred are identical and are as follows:-

(a) They submitted that they were under no obligation to produce evidence of duty incidence actually having been suffered and the same was irrelevant for determination of brand rate of duty drawback in terms of Rule 6 of the Drawback Rules, 2017; that the commercial invoice issued by M/s Vedanta Limited recorded that the price stated therein was inclusive of all taxes and duties and hence the decision of the lower authority to hold that they had not produced any evidence to establish the payment of duty was without basis;

(b) That the expression 'Drawback' has been defined in Rule 2(a) to mean "in relation to any goods manufactured in India and exported, means the rebate of duty excluding integrated tax leviable under sub-section (7) and compensation cess leviable under sub section (9) respectively of Section 3 of Customs Tariff Act, 1975 chargeable on any imported materials or excisable materials used in the manufacture of such goods" and that it was evident from the said expression that drawback is the rebate of duty chargeable on excisable material used in the manufacture of goods exported; that the expression used was "chargeable" and not actually levied or discharged, a fact which the lower authorities had overlooked;

(c) That the expression 'material' defined by Rule 2(b) to mean any material produced or manufactured in India subject to duty of excise made it clear that what is to be examined is the liability of duty of excise and did not required the evidence of actual duty to have been discharged;

(d) That Rule 6 of the Drawback Rules, 2017 stipulated that where no rate of drawback is fixed, any exporter can apply for determination of drawback wherein they were required to details pertaining to the proportion of materials or components used in the production or manufacture of goods and duty paid on such material and components; that the reference made to duty paid in the said Rule was a reference to duty payable in general on excisable material and not the evidence of actual duty having been paid on the excisable materials;

(e) That in terms of Rule 10 of the Drawback Rules, 2017, the Commissioner (Appeals) should have held that if the original authority wanted evidence regarding the duty having been paid, they should have sought the same from their supplier, M/s Vendanta Limited rather than drawing a adverse inference;

(f) That the Commissioner (Appeals) had erred in upholding the decision of the original authority wherein the quantum of NCCD and SWS suffered on the procurement of crude oil was not factored while fixing the brand rate of drawback on the grounds that evidence of payment of the same was not produced as NCCD was leviable at a specific rate and the invoice issued by their supplier had indicated that the same inclusive of all taxes; that there was no dispute the domestically procured crude oil had suffered the incidence of NCCD; that merely because precise duty payment particulars were not submitted was not reason enough to deny them the benefit of brand rate fixation; that the NCCD being leviable at specific rate, the quantum of consumption of crude oil should be enough to determine the incidence of NCCD for the purpose of fixing the brand rate of Drawback;

(g) That drawback was in respect of duty chargeable on imported/chargeable material used in the manufacture of goods and not on duty actually paid, as had been wrongly presumed by the lower authorities; that the lower authorities had sought to impose conditions which have not been prescribed by the Customs Act, 1962 or the Customs & Central Excise Duties Drawback Rules, 2017; that in terms of the definition of 'drawback' and 'excisable material' under the Drawback Rules and Central Excise Act, 1944, respectively, Drawback rate was required to be fixed, once it was established that the excisable material used in the manufacture of export products were chargeable to Central Excise duty, irrespective of the factum

of evidence regarding such duty payment having been suffered by the claimant;

(h) That it was not the Department's case that the indigenously procured crude oil was either not dutiable or had been procured without payment of duty and hence it could not refuse to fix brand rate of duty drawback on the grounds that the quantum of incidence of duty suffered was not forthcoming, when such quantum was easily ascertainable as NCCD was at specific rate; that it was settled law that material available in the market are deemed to be duty paid unless contrary was proved; they sought to place reliance on the decision of the Hon'ble Tribunal in the case of Usha Udyog vs CCE, Kanpur [2001 (136) ELT 1031 (Tri)] which was upheld by the Apex Court [2002(144)ELT EIIA 298 (SC)] and the decision of the Hon'ble Punjab & Haryana High Court in the case of CCE, Jullundur vs Empet Indigenous P. Limited [2010 (253) ELT 756 (P&H)]; they also placed reliance on the decision of the Hon'ble Tribunal in the case of Upper India Steel Manufacturing & Engineering Co. vs GTE, Chandigarh [1997 (96) ELT 306 (Tri)] Penara Udyog P. Limited vs GTE, Kanpur [1998 (98) ELT 228 (Tri)] and CCE, Chandigarh vs Upper India Steel Manufacturing Co. Limited [1998 (99) ELT 703 (Tri)] in support of their argument that the material procured by them should be deemed to be duty paid;

(i) That Drawback being an export incentive scheme, should be liberally interpreted; that is a settled Government policy that it is the goods which are to be exported and no the local taxes; that the crude oil procured by them was inclusive of all taxes and hence brand rate for the same should have been fixed and not declined on the grounds that the applicant had failed to quantify the same;

(j) That the Order-in-Appeal was vague, cryptic and mechanical and has been issued without adducing any independent finding/reasons for upholding the Order-in-Original; that the Commissioner (Appeals) had failed to take of the factual background and the submissions of the applicant; that the Order-in-Appeal was a non-speaking order and merely iterated the findings of the original authority; that it was a well settled principle of law that an order issued by a judicial or quasi-judicial authority should be a speaking order laying down cogent reasons for arriving at the conclusion with respect to the merits of the case and sought to place reliance on the following decisions in support of their argument - AC, Commercial Tax

Department, Works Contract and Leasing Quota vs Shukla & Bros [2010 (4) JT 35]; Santosh Hazari vs Purushottam Tiwari [2001 (2) JT 407] and S.N. Mukherjee vs UOI, [AIR 1990 SC, 1984].

In light of the above submissions, they prayed that the impugned Orders-in-Appeal be quashed and drawback be fixed on the quantity of indigenous crude used in the production of export goods.

4. Personal hearing in the matter was held on 09.01.2023 and Shri Vishal Agrawal, Shri Kartik Dedhia, both Advocates, Shri Devang Mankad and Shri Nitin, both Authorized Representatives, appeared on behalf of the applicant. They submitted that the invoices issued by their supplier show rate inclusive of all taxes. They, therefore contended that indigenous supply of crude should be considered duty paid. In respect of their submission before original authority that indigenous crude oil be considered as non-duty paid, they stated that it was done to get their claim expedited. They finally requested to allow their claim.

5. Government has carefully gone through the relevant case records available in the case file, the written and oral submissions and also perused the Orders/Letters of the Additional Commissioner and the impugned Orders-in-Appeal dated 17.03.2022 and 29.07.2022.

6. Government notes that the issue involved in both the impugned Orders-in-Appeal is whether the decisions of the lower authorities to not factor the quantum of NCCD on the indigenously procured 'Crude oil' while fixing the Brand rate of Drawback for the reason that the applicant failed to produce any evidence to indicate payment thereof, is correct or otherwise. Government notes that it is the contention of the applicant that the laws governing the fixing of Brand rates of Drawback do not require them to produce such evidence and the same should be fixed on the basis of the duty deemed payable on such inputs.

7. Government notes that the fixing of Brand rate of Drawback in respect of goods exported was governed by the Customs and Central Excise Duties Drawback Rules, 2017 (DBK Rules, 2017) during the material period. Government proceeds to reproduce and examine the relevant portions of the same.

The relevant portion of Rule 3 and Rule 6 of the DBK Rules, 2017, reads as follows:-

*"**3. Drawback.**– (1) Subject to the provisions of–*

(a) *the Customs Act, 1962 (52 of 1962) and the rules made thereunder;*

(b) *the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder; and*

(c) *these rules, a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government :*

Provided that where any goods are produced or manufactured from imported materials or excisable materials, on some of which only the duty chargeable thereon has been paid and not on the rest, or only a part of the duty chargeable has been paid; or the duty paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained

Provided further that no drawback shall be allowed –

(i) *if the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture;*

(ii) *if the said goods are produced or manufactured, using imported materials or excisable materials in respect of which duties have not been paid;....."*

(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;

(e) *the average amount of duties paid on imported materials or excisable materials used for containing or, packing the export goods;*

(f) *any other information which the Central Government may consider relevant or useful for the purpose.*

.....

.....

6. Cases where amount or rate of drawback has not been determined.-

(1)(a) Where no amount or rate of drawback has been determined in respect of any goods, any exporter of such goods may, within three months from the date relevant for the applicability of the amount or rate of drawback in terms of sub-rule (3) of rule 5, apply to the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, having jurisdiction over the place of export, for determination of the amount or rate of drawback thereof stating all the relevant facts including the proportion in which the materials or components are used in the production or manufacture of goods and the duties paid on such materials or components:

A reading of the above indicates the first proviso to Rule 3(c) and Clause (ii) to the second proviso lay down that in cases where duty chargeable has not been paid or short paid, the Drawback admissible shall either not be paid or be reduced taking into account such lesser duty paid. Given this legal position, the argument put forth by the applicant that Brand rate of Drawback in their case should be fixed on the basis of duty 'chargeable' on imported/excisable material used in the manufacture of goods and not on duty actually paid, is incorrect. Government notes that the above Rules clearly provide for non-payment of Drawback in those cases where the duty chargeable has not been paid or short paid. Further, it is also a fact that Drawback payable is determined in two different ways, the first one being the All India Rate which is determined by the Government on the basis of averages of several parameters like quantity of inputs consumed, duties paid etc., which is payable to the exporter without verification of any duty paying

documents. It is in this context that the phrase 'chargeable to duty' with respect to the inputs becomes relevant. The second method of determining Drawback involves fixing of Brand rate of Drawback with respect to an individual exporter as provided by Rule 6 of the DBK Rules, 2017. In such cases, as indicated by the extract of the said Rule reproduced above, it is imperative on the part of the exporter applicant to submit all the relevant facts including the proportion in which the material or components are used in the manufacture and duties paid on such material or components. There is no gainsaying the fact that when such details regarding consumption and duties involved are provided by the exporter, the same should be supported by proper evidence and it is not the case that the submission of the exporter should be accepted by the competent authority without any verification as suggested by the applicant in the present case. Government finds that the Board had vide Circular F. No.609/24/2002-DBK dated 24.06.2002 had provided the guidelines for fixation of Brand Rate of Drawback under the Simplified Scheme. Para 4 of the said Circular is reproduced below: -

> *" While submitting the Brand Rate applications, the exporters are required to neatly page number the essential annexures/documents and to enclose them strictly in the order of DBK-I, DBK-II/IIA, DBK-III/IIIA Statements, Shipping Bill/s, Bill of Entry, Invoices regarding payment of Central Excise duty, CENVAT availment/non-availment-Certificate/ Declaration; Working Sheet, Statement of Value Addition and Statement of Exports etc. Further, these should be flagged/marked distinguishably to facilitate preliminary checking of these documents by the Receipt Clerk while receiving the applications. In case of merchant exporters/manufacturer-exporters who are getting the export products manufactured from their supporting manufacturers/vendors, as the case may be, a separate declaration, inter alia, furnishing the details of the supporting manufacturer/ vendors, Central Excise Registration No., if any, availment/non-availment of the CENVAT benefit, duly authenticated by the Superintendent of Central Excise having jurisdiction over the manufacturing unit are required to be furnished.* ***The exporters are required to furnish original duty paying documents, viz; Bills of Entry pertaining to the imported items and Invoices evidencing payment of Central Excise Duty in respect of the indigenous inputs with reference to the claim of Brand Rate of drawback.*** *These original duty paying documents which have been fully utilized with the Brand Rate claim will be retained in this Ministry. The duty paying documents which have been partially utilized for disposal of the Brand Rate claim, will however be returned to the exporters along with requisite endorsement. Applications for issue of amendment and corrigendum to the Brand Rate letters are required to be filed maximum within a period of 3 months. Specimen copies of the revised format of the application*

for fixation of Brand Rate and DBK-I,II/IIA and III/IIIA Statements are attached.

[emphasis supplied]

As can be seen from the above, the Board vide the above Circular which lays down the guidelines for claiming Drawback, has clearly laid down that in the case of fixation of Brand Rate of Drawback, the exporters are required to furnish original duty paying documents, which in this case would be the Invoices evidencing payment of Central Excise Duty in respect of the indigenously procured 'Crude Oil' by the applicant. Thus, Government does not find fault with the decision of the lower authorities in requiring the applicant to the submit evidence indicating payment of duty on the Crude Oil procured by them indigenously. In view of the above, Government finds the argument of the applicant that the Brand rate of Drawback in their case should have been fixed by the original authority on the basis of the 'duty payable on the inputs consumed' to be ill-found and not in consonance with the legal provisions governing the same.

8. Government further notes that the applicant has taken issue with the action of the original authority asking for evidence to indicate that indigenously procured Crude Oil had suffered the duty on which Drawback was being claimed by them. Government finds Rule 10 of the DBK Rules, 2017 to be relevant in this context and the same is reproduced below:-

10. Power to require submission of information and documents.- *For the purpose of –*

(a) *determining the class or description of materials or components used in the production or manufacture of goods or for determining the amount of duty paid on such materials or components; or*

(b) *verifying the correctness or otherwise of any information furnished by any manufacturer or exporter or other persons in connection with the determination of the amount or rate of drawback; or*

(c) *verifying the correctness or otherwise of any claim for drawback; or*

(d) *obtaining any other information considered by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, to be relevant or useful, any officer of the Central Government specially authorised in this behalf by an Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, may require any manufacturer or exporter of goods or any*

other person likely to be in possession of the same to furnish such information and to produce such books of account and other documents as are considered necessary by such officer.

A reading of the above Rule indicates that it was well within the powers of the original authority to call for evidence indicating payment of duty on the Crude Oil indigenously procured by the applicant for factoring the same while fixing the Brand Rate of Drawback with respect to the goods exported by the applicant. Government finds that the applicant has submitted that the original authority, in case of doubt, should have called for the details of the duty paid from their supplier and not from them. In this context, Government finds that Rule 11 of the Central Excise Rules, 2002 provides that all duty paid goods, which in this case is 'Crude Oil' procured directly from the indigenous manufacturer by the applicant, should be accompanied by a Central Excise Invoice which indicates the quantum of the various duties paid on the goods covered by it. It is not in dispute that the said 'Crude Oil' was procured by the applicant from a unit within the country and hence the applicant should have been in possession of such Central Excise Invoices indicating duty paid by their supplier. Government finds that the Board's Circular dated 24.06.2002, cited above, clearly requires the applicant to submit such Invoices indicating payment of Central Excise duty on the inputs procured indigenously when they applied for fixation of Brand rate of Drawback. Government finds that the applicant to be indulging in prevarication when they submit that they do not have any duty paying documents with respect to the indigenously procured 'Crude Oil' and that they received the said input under a 'Commercial Invoice' which indicated a composite price which was inclusive of taxes; it will not help their cause. Government finds that the applicant has relied on several case laws, cited above, in support of their argument that the onus was on the Department to prove the non-duty paid nature of goods. Government has examined them and finds that the facts of the cases cited to be different from the instant one. In the case of Usha Udyog vs UOI [2002 (144)ELT A298 (SC)] cited by the applicant, the Hon'ble Supreme Court had held that for availing deemed credit Iron and Steel re-rollable material bought from the open market are to be deemed as duty paid unless contrary proved by the Department. Government notes that the instant case differs from the cited one inasmuch as in the present case the applicant, as submitted by the applicant themselves, had procured the inputs directly from the manufacturer

themselves on the basis of a long term contract and it is not the case that the they procured the input 'Crude Oil' from the open market. As stated earlier, when the procurement is directly from a manufacturer, the applicant is supposed to be in possession of the Central Excise Invoice under which the manufacturer cleared the goods. Thus, the present case is clearly different from the one cited and hence the same will not be applicable here. Government finds that the other cases cited by the applicant involved denial of 'Deemed Modvat/Cenvat credit' on inputs. Once again, Government finds that the issue involved is different and deals with a scenario wherein the Modvat/Cenvat was denied on goods which were deemed to be duty paid. Government finds that the present issue is that of fixation of Brand rate of Drawback involving inputs procured by the applicant directly from the manufacturer in respect of which they failed to produce evidence indicating payment of duty and hence different from the cases cited by the applicant in their defense. Thus, the cases cited by the applicant in their defense will not have any application here.

9. Further, Government also finds that the applicant themselves had requested the original authority to treat the indigenously procured 'Crude Oil' as non-duty paid and fix the Brand Rate of Drawback accordingly, which they later stated was to avoid delay in fixing of the Brand rate. Government finds it a bit strange that the applicant subsequently changed their stand and are now insistent that the original authority factor the 'duty payable' on such indigenously procured 'Crude Oil' while fixing their Brand Rate of Drawback based on the documents/data submitted by them earlier.

10. In view of the above, Government finds the contention of the applicant that the lower authorities should have allowed the duty payable on the indigenously procured 'Crude Oil' to be factored while fixing the Brand Rate of Drawback in respect of the goods exported by them, to be improper and against the legal provisions governing the fixing of Brand Rate of Drawback. Government finds that the Commissioner (Appeals) has correctly held that the applicant having failed to produce evidence with regard to the NCCD paid on the Crude Oil procured indigenously, it was not possible at this juncture to factor the quantum of duty suffered, if any, on such input, in the Brand rate of Drawback. Government finds the submission of the applicant that both the impugned Orders-in-Appeal passed by the Commissioner (Appeals) are non-speaking Orders, to be incorrect.

Government finds that the Commissioner (Appeals), in both the impugned Orders-in-Appeal has addressed all the issues raised in a precise manner and has arrived at reasonably justified conclusions. Government finds both the subject Orders-in-Appeal to be well reasoned and upholds both of them.

11. In view of the above, Government finds both the subject Revision Applications to be devoid of merits and rejects them.

28/2/23

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

ORDER No. 375-390 /2023-CUS (WZ) /ASRA/Mumbai dated .02.2023

To,

M/s Nayara Energy Limited, (Formerly known as Essar Oil Limited)
P.O. Box 24, Khambhaliya, Dist. Devbhumi,
Jamnagar.

Copy to:

1. The Commissioner of Customs (Preventive), Jamnagar.
2. The Commissioner of Customs (Appeals), Ahmedabad, 7th floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad – 380 009.
3. M/s TLC Legal, Advocates, Nirmal, 1st & 19th floor, Nariman Point, Mumbai - 400 021.
4. Sr. P.S. to AS (RA), Mumbai
5. Notice Board.