

REGISTERED SPEED POST



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
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Mumbai- 400 005

371/31/DBK/15-RA / 9881

Date of Issue :- 20.10.22

ORDER No. 288/2022-CX (WZ) /ASRA/Mumbai DATED 17.10.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal No. PUN-EXCUS-001-APP-225/14-15 dated 11.03.2015 passed by the Commissioner (Appeals-I), Central Excise, Pune.

Applicant : M/s. Sandvik Asia Pvt. Ltd., Mumbai-Pune Road, Dapodi, Pune-411 012.

Respondent : Pr. Commissioner CGST, Pune-I.

ORDER

This Revision Application are filed M/s. Sandvik Asia Pvt. Ltd., Mumbai-Pune Road, Dapodi, Pune-411 012 (hereinafter referred as "applicant") against the Order-in-Appeal No. PUN-EXCUS- 001-APP-225/14-15 dated 11.03.2015 passed by the Commissioner (Appeals-I), Central Excise, Pune.

2. Briefly stated the facts of the case are that Applicant had filed an Application dated 24-07-2013 under Rule 7 (1) of Customs & Central Excise Duties & Service Tax Drawback Rules, 1995 (DBK Rules' in short) with the Commissioner, Central Excise, Pune - I Commissionerate for fixation of brand rate of drawback of customs duty paid amounting to Rs. 24,18,642/-.

3. The Additional Commissioner (BRU), Central Excise, Pune-I Commissionerate vide letter F.No. P-I/BRU/D-IV/Sandvik/86/13 dtd. Nov. 2013 sanctioned drawback amount of Rs. 23,66,722/-. However an amount of Rs.51,920/ claimed for shipping bill No. 4521959 dated 19.3.2013 was held to be inadmissible on account of payment of Customs duty through scrip available in the Focus Market Scheme Certificate No. 3110056521 for the material imported vide Bill of Entry No. 9503991 dated 07-03-2013 as the same was inadmissible as per Notfn. No. 93/2009-Cus dated 11-09-2009.

4. Aggrieved by the order / letter F.No. P-I/BRU/D-IV/Sandvik/86/13 dtd. Nov. 2013 of the Additional Commissioner (BRU), Central Excise, Pune-I Commissionerate rejecting the amount of Drawback, the applicant preferred the appeal before Commissioner (Appeals-I), Central Excise, Pune. The Commissioner (Appeals) upheld the decision of the Adjudicating Authority while observing that :-

"8.1 I find that Notification No. 03/2009- Cus dated 11-09-2009 exempts goods when imported into India against duty credit scrip issued under

FMS and as per condition (iv) of the notification supra the exporter can avail DBK or CENVAT Credit of only Additional duty of Customs leviable under Section 3 of the CTA. Further, the exemption under the FMS is governed by Para 3.14 of the Foreign Trade policy which states that the exemption is available to the importer from whole of the duty of customs leviable under the First Schedule of the CTA and whole of the additional duty leviable under Sec. 3 of the CTA, subject to observance of the conditions stipulated under the said notification. It is stated in the said Para of FTP 2009-14 that the objective of the FMS Scheme is to offset the freight cost and other externalities to select international markets with a view to enhance India's export competitiveness in these markets. I find that Respondents have referred to Para 3.17.6 of the FTP wherein it is stated that additional customs duty/excise duty paid in cash or through debit under duty credit scrips shall be adjusted as CENVAT credit or duty drawback. I find that Clause (ii) of the second proviso to Rule 3 of DBK Rules states that the relief of Additional duty of Customs debited through these scrips is allowed as drawback or CENVAT. It is thus clear that the importers are not entitled for drawback of any other duties debited in the scrip under FM except additional duty of Customs. This view taken by me is supported by the decision of GOI in case of Dorf Ketel Chemicals(I) Pvt. Ltd. [2013 (295) ELT 155 (GOI)] while deciding a Revision Application filed before the Department of Revenue, the Revisionary Authorities have observed as under:

"Admittedly duty drawback not allowed when Customs duty paid through debit of DEPB scrip under proviso (ii) of Rule 3 ibid - As per C.B.E. & C. Circular No. 41/2005 Cus, only Additional Customs Duty paid through DEPB to be considered for fixation of brand rate - Payment of Customs duty through DEPB for allowing duty drawback not legally tenable."

The ratio of the said decision is squarely applicable to the matter under consideration. I find that the Appellants have accepted that the condition to notification 93/2009-Cus stipulates that DBK/Cenvat credit of additional customs duty is admissible. They however have argued that although it is not explicitly mentioned in the said notification that DBK of Basic Customs Duty is admissible, the benefit is available since the DBK of BCD is governed by Sec. 75 of CA. I do not find any merit in this argument. Any notification or statute is to be read and interpreted as it is and there cannot be any reading between the lines while interpreting any statute/notification....."

5. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed This revision Application under Section 35EE of Central Excise Act, 1944 before Central Government on the following main grounds :-

5.1 The rejection of the drawback application by the Additional Commissioner (BRU) is clearly against the basic intention of section 75 of the Customs Act, 1962 and Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 of granting refund of duties & taxes to exporters as per the definition of the drawback & fulfillment of given conditions therein.

5.2 Exemption of Customs Duty Payment under Notification no. 93/2009 Cus dtd. 11.09.2009 is by way of debit under Duty Credit Scrip issued under Focus Market Scheme doesn't mean that No Duty Payment.

5.3 Under Notification no. 93/2009 cus dtd. 11.09.2009, Cenvat/Drawback of duty debited under Duty Credit Scrip issued under Focus Market Scheme is not restricted to only Additional Customs Duty.

5.4 Duty Credit Scrips issued under Focus Market Scheme, Focus Product Scheme & Vishesh Krishi Gramin Udyog Yojana (VKGUY) can be used for payment of all duties under Import, Excise Duty and Service Tax.

5.5 Basic Customs Duty Debited under Duty Credit Scrip shall be adjusted for duty drawback This has been clarified specifically in the n Foreign Trade Policy notified in April 2015 and in the notification issued thereunder.

In view of the above facts and various grounds, the Appellants requested to set aside & quash such OIA issued by the Commissioner (Appeals) Pune-1 and OIO issued by the Additional Commissioner, Brand Rate Unit, Pune-1 which disallowed the duty drawback claim of Rs. 51,920/- and allow the Duty Drawback.

6. A Personal hearing was held in this case on 30.03.2022 and Shri Shripad Deshkulkarni, Sr. Manager and Shri Dastagir Sayyad, Executive, appeared online on behalf of the applicant and reiterated their earlier submissions. They submitted that small amount of drawback was disallowed to them as this much duty was paid through Focus Market Scheme. They referred to case law of M/s. Ratnamani Metals, of Gujarat High Court.

7. The Government has carefully gone through the submissions made by the applicant in the instant Revision Application and oral submissions made during the personal hearing along with the Order in Appeal, letter referred to in Para 3 above, Order in Appeal, and the circulars / relevant judgements cited for and against in this case.

8. Government notes that the main issue involved in the instant revision application is whether the applicants are entitled to drawback against the Basic Customs Duty (BCD) paid through duty free scrips such as Focus Market Scheme (FMS) or not?

9. Government observes that the Additional Commissioner (BRU), Central Excise, Pune - I had denied the drawback claim against Basic Customs duty on the following grounds:

- Drawback was held to be inadmissible on account of payment of Customs duty through scrip available in the "Focus Market Scheme Certificate No. 3110056521" for the material imported vide Bill of Entry No. 9503991 dated 07-03-2013 and paid the Customs duty through scrip which is not admissible as per Notification No. 93/2009 dated 11-09-2009.
- The notification provides exemption to whole of Customs Duty leviable under Section 5 of Customs Tariff Act, 1975 and whole of Additional Customs Duty leviable under Section 3 of Customs Tariff Act, 1975.

- The condition of the Notification is as follows.....

"(v) that the importer shall be entitled to avail the drawback or cenvat credit of additional duty leviable under section 3 of the said Customs Tariff Act against the amounts debited in the said scrip"

- No Drawback is available for the duties of Customs leviable under section 5 of Customs Tariff Act, 1975. Since claim is for the Customs Duty (Levied under Section 5 of the Customs Tariff Act, 1975) no drawback is admissible. Accordingly, the same was restricted for the claim.

10. The decision of the Additional Commissioner (BRU), Central Excise, Pune Commissionerate was upheld by the Commissioner (Appeals-I), Central Excise, Pune as legal and correct vide his Order dated 11.03.2015.

11. The Government has carefully examined the contentions of both the sides. The Government observes that an identical issue in Revision Application No. 371/48-60/DBK/2015-RA filed by M/s Honeywell Turbo Technologies India Pvt. Ltd., Pune came up for consideration before this office in recent past and Government vide Order No. 1-13/2017-CUS/ASRA/Mumbai Dated 08.11.2017 allowed brand-rate of drawback in relation to BCD paid on the goods imported using FPS/FMS scrips, by following the decision of Hon'ble Gujarat High Court Judgement [2016(339)ELT 509 Guj] in Ratnamani Metals and Tubes Ltd. While partially allowing the Revision Application filed by M/s Honeywell Turbo Technologies India Pvt. Ltd., Government in its aforesaid order observed as under :

"19. The Government has carefully examined the contentions of both the sides. The Government has noticed that the identical issue came up for consideration before Hon'ble Gujarat High Court in the case of Ratnamani Metals and Tubes Ltd and Jayant Agro Organics Ltd. [reported in 2016(339)ELT 509 (Guj)]. While deciding the issue whether, when an importer utilizes DEPB scrip for the purpose of customs duty on inputs and raw materials, benefit of duty drawback would be available upon export of final product, after hearing both sides, High Court allowed the petitions. The relevant paras of the said judgement (paras 16 and 17) dated 06.05.2016 are reproduced below :-

"16. It can thus be seen that the DEPB scheme aims at neutralising the incidence of customs duty on import component of export product, where upon export, credit would be given at specified rate on the FOB value of the exports. Such credit could be utilised for payment of duty in future or may even be traded. It was in this background that Supreme Court in case of Liberty India v. Commissioner of Income tax reported in 317 ITR 218, had held that DEPB being an incentive which flows from the scheme framed by the Central Government, hence, incentives profits are not profit derived from the eligible business (in the said case falling under Section 80IB of the Income Tax Act) and belong to the category of ancillary profits of the undertaking. Such incentive in the nature of DEPB benefit from the angle of the income tax has been seen as income of the

undertaking. Thus when an importer whether imports goods under DEPB scheme or pays customs duty on the imports on purchased DEPB credits, he essentially pays customs duty by adjustment of the credit in the passbook. It would therefore, be incorrect to state that the imports made in such fashion have not suffered the customs duty”.

17. “As noted, neither Section 75 nor the Rules of 1995, prohibits entitlement of drawback when the basic customs duty has been paid through DEPB scrip. To read such limitation through the clarification issued by the Government of India in various circulars which principally touch the question of eligibility of drawback, when additional duties have been paid through DEPB would not be the correct interpretative process”.

Further, the said judgement also considers the various exports promotion schemes like VKGUY, FMS & FPS on the same footing as that of DEPB Scheme. The relevant paras i.e 19, 20 of the said judgement are reproduced below:-

“19 The case of imports under different other schemes substantially stand on the same footing. Though as is bound to be, terms of each scheme are different. In case of VKGUY, the foreign policy provides for incentive with the objective to compensate high transport costs and offset other disadvantages to promote exports of various products specified therein which include the agricultural produce, minor forest produce, Gram Udyog products, forest based products etc. In case of such exports, the incentive is made available in form of duty credit scrip at the rate of 5% of the FOB value of the exports. Likewise, in case of FMS, it is provided that same is to offset high freight cost and other externalities to select international markets to enhance India’s export competitiveness in these markets. Specified product exported to specified countries qualify for such benefits. Duty credit scrip at the specified rate of the FOB value of the exports would be provided. In case of FPS, the objective is to promote export of products which have high export intensity/employment potential so as to offset infrastructural inefficiencies and other associated costs involved in marketing of these products. In this scheme also, exports qualify for duty credit scrip at the rate of 2% or 5% of the FOB value as provided in the notification. It can thus be seen that in all these cases, for different reasons the Government of India provides export incentives at specified rates of the value of the exports. The intention is to make the exports viable, more competitive and to neutralize certain inherent handicap faced by the industry in the specified areas. These export incentive schemes have nothing to do with offset of duty element of imported raw materials or inputs used in export products, unlike as in the case of DEPB.”

"20 Thus, under these schemes, the Government of India having realised that exports in question require added incentive, provides for the same in form of credit at specified rate of FOB value of the export which credit can be utilised for payment of customs duty. To disqualify such payment for the purpose of duty drawback would indirectly amount to denying the benefit of the export incentive scheme itself".

20. The office of the Commissioner of Goods and Service Tax, Kutch, Gandhidham vide letter F No. Legal/SCA-01/2015 dated 17.10.2017 has informed that they had proposed filing of SLP before Hon'ble Supreme Court against Hon'ble Gujarat High Court's order dated 06.05.2016 in the case of Ratnamani Metals and Tubes Ltd and Jayant Agro Organics Ltd. However, Senior Analyst, Legal Cell CBEC New Delhi vide letter F.No. 276/178/2016-CX.8A, dated 21.09.2016 informed that with the approval of the competent authority it was decided not to file SLP in the subject case, as the Revenue has been adopting views that lead to conclusion that debit of BCD in the scrip is a mode of payment of that duty in lieu of cash payment of duty, since freely transferable duty credit was given in lieu of cash refund or incentive.

21. In view of the aforesaid clarification of the Legal Cell CBEC, Govt. observes that Hon'ble Gujarat High Court's order dated 06.05.2016 in the case of Ratnamani Metals and Tubes Ltd and Jayant Agro Organics Limited has attained finality.

22. Thus, it is evident that the issue involved in this case is squarely covered by the ratio of aforesaid Hon'ble Gujarat High Court's order dated 06.05.2016 in the case of Ratnamani Metals and Tubes Ltd and Jayant Agro Organics Ltd. [reported in 2016 (339) ELT 509 (Gujarat)], in favour of the applicants.

23. The Government following the ratio of aforementioned judgment of Gujarat High Court which has attained the finality, holds that the applicants' are entitled to drawback against the Basic Customs Duty paid through Focus Product Scheme (FPS) and Focus Product Scheme (FMS) scrip.

12. As the facts of the case of M/s Honeywell Turbo Technologies India Pvt. Ltd., Pune are identical, Government holds that the ratio of the above judgment will squarely apply to the case in hand.

13. In view of the above facts and circumstances, Government sets aside Order-in-Appeal No. PUN-EXCUS- 001-APP-225/14-15 dated 11.03.2015

and allows the drawback of the Basic Customs duty paid through duty free scrips, viz. Focus Market Scheme (FMS) to the applicant claimed under the impugned application.


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

ORDER No. 288/2022-CX (WZ) /ASRA/Mumbai Dated: 17.10.2022

To,

M/s. Sandvik Asia Pvt. Ltd.,
Mumbai-Pune Road,
Dapodi, Pune-411 012

Copy to:

1. The Principal Commissioner of CGST, Pune-I Commissionerate, GST Bhavan, ICE House, Opp. Wadia College, Pune 411 001.
2. The Commissioner of CGST (Appeals-I) Pune, GST Bhavan, ICE House, Opp. Wadia College, Pune 411 001
3. The Additioinal Commissioner (BRU), CGST Pune-I Commissionerate. GST Bhavan, ICE House, Opp. Wadia College, Pune 411 001.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Spare Copy.