

REGISTERED
SPEED POST



F.No.380/49/DBK/13-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
DEPARTMENT OF REVENUE
(REVISION APPLICATION UNIT)

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

Date of Issue: 23/11/15

ORDER NO. 30/2015-CUS DATED 16.11.2015 OF THE GOVERNMENT OF INDIA,
PASSED BY SMT. RIMJHIM PRASAD, JOINT SECRETARY TO THE GOVERNMENT OF
INDIA, UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

Subject : Revision Application filed, under Section 129 DD of the Customs Act, 1962 against the Order-in-Appeal No. 199/Pat/CEX/Appeal/2012 dated 11.10.2012 passed by Commissioner (Appeals), Customs, Central Excise and Service Tax, Patna.

Applicant : Commissioner of Central Excise & Service Tax, Patna.

Respondent : M/s. Indian Oil Corporation, Barauni.

ORDER

This revision application is filed by Commissioner of Central Excise & Service Tax, Patna (herein after referred to as Applicant) against the Order-in-Appeal No. 199/Pat/CEX/Appeal/2012 dated 11.10.2012 passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Patna with respect to Order-in-Original No. 04/DBK/ Jt.Commr/2011 dated 08.08.2011, passed by the Joint Commissioner (Technical), Central Excise Hqrs., Patna.

2. Brief facts of the case are that M/s Indian Oil Corporation Ltd, Barauni (hereinafter referred to as Respondent) filed an application for provisional fixation of brand rate of drawback under Rule 6 of the Customs & Central Excise Duty Drawback Rules, 1995 for the month of April 2010 vide letter Ref. BR/Finance/Drawback/61/2010 dated 29.06.2010 received in the office on 30.06.2010.

2.1. After examination of application, the respondent were intimated vide letter C.No. VIII(20)1/Tech/DBK/2010/237 dated 05.07.2010 that the same is not maintainable for the following reasons :-

1. The application submitted is not in the proper format as prescribed. The declaration required to be filed alongwith the application is also not enclosed with the application.
2. The application has not been received within the prescribed time limit of 60 days as per provisions of Rule 6 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995.
3. The copies of the shipping bills/bills of entry have not been attested as required.

The respondent vide letter no. BR/Finance/Drawback/77/2010 dated 23.07.2010 filed a revised application which was received in the office on 27.07.2010 alongwith revised annexure of brand rate. The department vide letter C.No VIII(20)1/Tech/DBK/2010/352 dated 29.07.2010 further pointed out to the respondent that the "Declaration regarding non avilment of CENVAT Credit and non-claiming remission of Brand Rate in case of any upward assessment of Crude Oil Bills of Entry" were not duly signed and they were requested to expedite reply for early processing of their application.

2.2. The respondent vide letter no. BR/Finance/Drawback/88/2010 dated 18.08.2010 received in the department on 20.08.2010 intimated that their export is from multiple location covering different land customs station causing delay in receipt of bills of export to Barauni Refinery. Moreover, Notification No. 13/2010-Cus came into existence from 16.06.2010 therefore, they took the permissible period for filing brand rate application as per new permissible period of 90 days. Later on they came

to know that for the brand rate application of April month the old time limits shall be applicable. Further without intimating any cause of delay they requested for condonation of delay as a special case.

2.3. As no specific reasons were shown which prevented the respondent from filing application for brand rate within time limit, the condonation of delay was not granted by the Commissioner, Central Excise, Patna. A Show Cause Notice dated 28.02.2011 was issued to respondent alleging therein as to why the drawback application for the month of April 2010 should not be rejected on the ground that it has been submitted beyond the permissible time limit as specified under Rule 6(1) (9) of the Customs & Central Excise Duty Drawback Rules, 1995.

2.4. The Show Cause Notice was adjudicated by the Joint Commissioner (Tech), Central Excise Hqrs., Patna who rejected the application for fixation of brand rate for the month of April 2010 being not maintainable vide Order-in-Original No. 04/DBK/Jt.Commr/2011 dated 08.08.2011.

3. Aggrieved by the said order the respondent filed appeal with Commissioner (Appeals) who vide Order-in-Appeal No. 199/Pat/CEX/Appeal/2012 dated 11.10.2012 set aside the order of the original authority.

4. The order of the Commissioner (Appeals) was reviewed by the Department, who vide Review Order dated 10.01.2013 directed the Assistant Commissioner (RRA), Central Excise & Service Tax, Patna to file Revision Application alongwith condonation of delay, on the following grounds:-

4.1. That the drawback claim relates to exports effected in April 2010 and as per provisions of Customs & Central Excise Duty Drawback Rules, 1995 applicable at that time, the claim was required to be filed within 60 days from the Let Export Order. That time limit of 60 days was extendable by 30 days by the Commissioner, if he was satisfied that the exporter was prevented by sufficient cause from filing the application within the such time period 60 days.

4.2. That in the present case the claim of drawback under brand rate to be fixed was filed on 91st day from Let Export Order and Commissioner also did not grant condonation of delay. That the adjudicating authority was correct in rejecting such application for fixation of brand rate when the new time period (of 3 months) vide Notification No. 49/2010-Cus(NT) dated 17.06.2010 became effective prospectively only and the time limit of 60 days related to the case (first shipping bill of 01.04.2010) had already lapsed on 30th May 2010 itself. That the period of 60 days expired for all the exports made in April 2010 before the date of application filed on 30.06.2010.

4.3 That the new time period prescribed by the amending Notification No.49/2010-CUS(NT) dated 17.06.2010 cannot be made applicable for the cases related to exports effected prior to issue of amending Notification.

5. A request for condonation of delay in filing the Revision Application was also made on the following grounds:

5.1 A Revision Application against Order-in-Appeal No.199/Pat/Cex/ Appeal/2012 dated 11.10.2012 in the matter of M/s Indian Oil Corporation Limited, Barauni Refinery, Barauni passed by the Commissioner (Appeals), Customs, Central Excise & Service Tax, Patna is being filed today, i.e. after lapse of three months time as prescribed under Section 35EE(2) of the Central Excise Act'1944. However, the date of filing of this application is within the condonable period of further three months time as prescribed under proviso of Section 35EE(2) of the Central Excise Act'1944.

5.2 The said Order-in-Appeal No. dated 11.10.2012 was dispatched from the office of the Commissioner (Appeals) Customs, Central Excise & Service Tax, Patna on 11.10.2012 and was received in the office of the Commissioner, Central Excise, Patna on 16.10.2012.

5.3 As such, the last date for filing the revision application by the Department was due on or before 15.1.2013, i.e. within three months from the date of the communication of the order [as per Section 35EE(2)].

5.4 In this case, the Appeal before the Hon'ble CESTAT, Kolkata was inadvertently filed by dispatching the same on 14.1.2013 after obtaining the opinions of Committee of Commissioners, Central Excise, Patna and Jamshedpur in terms of provisions of Section 35B(2) of the Central Excise Act,1944.

5.5 The Hon'ble CESTAT, Kolkata vide its defect memo dated 21.01.2013 communicated that as per Section 129A (b) (c) the appeal regarding payment of drawback does not lie to the Tribunal.

5.6 When the defect memo was received from the Hon'ble CESTAT, Kolkata it was realized that in the case, a Revision Application under Section 35EE(1) is required to be filed before the Central Government. The matter was processed & order of Commissioner has been obtained for filing revision application.

5.7 The delay is due to inadvertent mistake of law and is not intentional. It is genuine and bonafide.

6. A Show Cause Notice was also issued to the Respondent who in the cross objections have submitted as under:-

6.1. That under Rule 6 of the Customs, Central Excise & Service Tax Duty Drawback Rules, 1995 where no amount or rate of drawback has been determined in respect of any goods, a manufacturer within 60 days from the date relevant for the applicability of the amount or rate of drawback may apply to the Commissioner of Central Excise or the Commissioner of Customs & Central Excise having jurisdiction over the

manufacturing unit for determination of the amount or rate of drawback, provided that such Commissioner if he is satisfied that the manufacturer was prevented by sufficient cause from filing the application within the aforesaid period of 60 days may allow further extension of 30 days in filing the brand rate application.

6.2. That the products of Barauni Refinery is cleared for export to Nepal on daily basis through multiple tank lorries from Refinery as well as from various Marketing Terminal. That bills of export duty endorsed by Customs are collected from multiple land customs by the marketing locations which in turn handover the same to Barauni Refinery for filing monthly brand rate application.

6.3. That in IOCL there is necessity to file brand rate application on monthly basis due to fluctuation in input-output ratio under DBK-I and average rate of customs duty under DBK- II on monthly basis. That it is generally difficult for IOCL, Barauni Refinery to complete all the formalities within 30 days by collecting bills of export from Land Customs Station, it's reconciliation at marketing locations, submission to Refinery for enclosure in the brand rate applications, preparation of DBK-I on the basis of monthly yield pattern of the Refinery, collecting bills of entry of crude oil from port locations and preparation of DBK-II.

6.4. That in the past also the respondent have requested to Commissioner to allow 30 days condonation of delay in filing brand rate application by citing practical difficulties and the same have been allowed by the authorities.

6.5. That the time limit for filing application for fixation of brand rate under Duty Drawback Scheme(Rule 6 and 7 of Customs, Central Excise & Service Tax Drawback Rules, 1995 has been revised vide Notification No. 49/2010-Cus(NT) dated 17.06.2010 read with Circular No. 13/2010-Cus dated 24.06.2010.

Type of claim	Previous time limits	Revised time limits
Brand rate claim (Rule 6 and 7 of Customs, Central Excise & Service Tax Drawback Rules, 1995)	The claim was required to be filed within 60 days from the date of let export order. This time limit could be extended by 30 days by the Commissioner if he was satisfied that the exporter was prevented by sufficient cause from filing the application within the aforesaid time period.	The claim may be filed within 3 months from the date of Let Export Order. This time limit may be extended by 3 months by the AC/DC and by another 06 months by the Commissioner.

6.6. That due to the prevailing export operations constraints, logistics and the formalities needs to be done in filing monthly brand rate application , the brand rate application for the month of April 2010 could not be submitted by 31.05.2010. That the application for the month of April 2010 was filed on 30.06.2010.

6.7. That relying on the Notification No. 49/2010-Cus(NT) dated 17.06.2010 issued on 24.06.2010 by CBEC relaxing the normal date of filing of brand rate application, from 60 days to 90 days from the Let Export Order i.e. without application for condonation of delay, the respondent had filed the claim on 30.06.2010, without the application for condonation of delay, considering the timeline provisions amended to be applicable for brand rate fixation of April 2010 also.

6.8. That the Joint Commissioner vide letter dated 05.07.2010 intimated the respondent that the application for brand rate fixation should have been made within 60 days on or before 31.05.2010 based on the earlier timeline rules and that the timelines provided in Circular No. 13/2010 dated 24.06.2010 was applicable for exports from May 2010 onwards only.

6.9. That vide letter dated 18.08.2010, the respondent applied for the condonation of delay in filing, stating the situation which led to apply for brand rate fixation without the related condonation of delay. That the grounds pleaded for the condonation of delay were the same grounds, pleaded by them in their various earlier applications for condonation of delay and which had been granted and allowed by the department.

6.10. That the respondent submitted the documents in support of the grounds stated praying for an early fixation of the brand rate for April 2010 but the same were turned down by the Joint Commissioner and denied the fixation of brand rate.

6.11. That the Commissioner (Appeal) allowed the appeal on the provision of the Board Circular No. 13/2010 dated 24.06.2010 wherein the time limits to file the brand rate application had been increased from 60 days to 3 months.

6.12. That the Commissioner (Appeals) had rightly passed the order because the Notification 49/2010-Cus(NT) dated 17.06.2010 is applicable for all the claims pending as on the date of notification. That the notification has nowhere specifically excluded the exports made in the month of April 2010.

6.13. That the delay of one day in addition to 30 days time is not correct since the day of exports (shipping bill) is 1st April, 2010 and the brand rate fixation application has been filed on 30th June, 2010 i.e. on the 90th day from the date of the Let Export Order.

6.14. That the respondent placed reliance on the case law Wipro Information Tech. Ltd Vs Under Secretary (Drawback Directorate) reported in 1998 (102)ELT 547(Kar) in support of their claim.

7. Personal hearing scheduled in this case on 04.08.2015 was attended by Shri Om Prakash Singh, Assistant Commissioner, Central Excise, Division, Patna-II, on behalf of the department and Shri Chandan Kumar, Senior Finance Manager, on behalf

of the respondent. Both the department and the respondent reiterated the grounds of appeal and cross objections filed respectively.

8. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Orders-in-Appeal.

9. Government first takes up the application for condonation of delay in filing the Revision Application by the Department after a delay of 70 days. The department received the impugned Order-in-Appeal on 16.10.2012. The department filed appeal before CESTAT on 14.01.2013. The CESTAT, Kolkata vide its defect memo dated 21.01.2013 communicated that as per Section 129A (b) (c) the appeal regarding payment of drawback does not lie to the Tribunal. Then the department filed Revision Application before Government of India on 01.04.2013.

The time calculation for filing revision application is as under:-

A. Date of receipt of impugned OIA	16.10.2012
B. Date of filing appeal before Tribunal	14.01.2013
C. Total time taken for filing appeal before Tribunal	A-B=90 days
D. Date of communication of Tribunal's order	21.01.2013
E. Date of receipt of Revision application	01.04.2013
F. Time taken to file Revision Application from receipt of Tribunal's order	D-E=70 days
G. Total Time taken from date of receipt of Order-in-Appeal in filing Revision Application excluding time lapsed in CESTAT	C+F = 160 days.

9.1. Government notes that the Hon'ble High Court of Gujarat in case M/s Choice Laboratory vide order dated 15.09.2011, Hon'ble High Court of Delhi in case of M/s High Polymers Ltd. vide order dated 04.08.2011 and Hon'ble Bombay High Court in case of UOI (Revisionary Authority) Vs M/s EPCOS India Pvt. Ltd & Anr. 2013(290)ELT 364 (Bom) in order dated 25.04.2012 have held that the period spent in prosecuting the proceedings bonafidely before the CESTAT, which had no jurisdiction, have to be excluded by giving the benefit of the provision of Section 14 of Limitation Act, 1963 while reckoning the time limit for filing revision application.

9.2. As such, after excluding time elapsed before Tribunal the applicant filed this revision application in 70 days after initial 90 days period, which falls within condonable limit of 90 days. Hence, Government condones the said delay and proceeds to examine the Revision Application on merits.

10. From the records, Government observes that the issue for decision is rejection of claim of Brand Rate Fixation for the export for the month of April 2010, as time barred, since the same has been filed after expiry of 60 days period from the "Let Export" date stipulated in Rule 6 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Government observes that the respondent has filed an

application for fixation of brand rate of drawback under the above referred Rule for the month of April, 2010 on 30.06.2010 and a revised application was filed on 27.7.2010. On scrutiny of the claim it was noticed that the respondent has filed the claim on 91st day of the Let Export Order. As no specific reasons were shown which prevented the respondent from filing application for brand rate within time limit, the condonation of delay was not granted by the Commissioner, Central Excise, Patna. A Show Cause Notice was issued to the respondent alleging therein as to why the drawback application for the month of April 2010 should not be rejected on the ground that it has been submitted beyond the permissible time limit as specified under Rule 6(1) (9) of the Customs & Central Excise Duty Drawback Rules, 1995. The Show Cause Notice was adjudicated by the Joint Commissioner (Tech), Central Excise Hqrs., Patna who rejected the same vide Order-in-Original No. 04/DBK/Jt.Commr/2011 dated 08.08.2011. Aggrieved by the said order the respondent filed appeal with Commissioner (Appeals) who vide Order-in-Appeal No. 199/Pat/CEX/Appeal/2012 dated 11.10.2012 allowed the appeal of the party and set aside the Order-in-Original. Now the department has filed the Revision Application on the grounds mentioned at para 4 above.

11. Government notes that the applicant has contended that as per Rule 6 of the Customs & Central Excise Duty Drawback Rules, 1995, the time limit for filing application for brand rate was only 60 days and could be further condoned by Commissioner by another 30 days. The respondent on the other hand has argued that the time limit for filing brand rate application and condonation if any thereof was extended by Notification No. 49/2010-Cus(NT) dated 17.06.2010 which amended Rule 6 *ibid*. In view of the rival contentions, Government now proceeds to examine the various statutory provisions relating to this case.

11.1. The applicant has relied upon Rule 6 of Customs & Central Excise Duty Drawback Rules, 1995, as it existed prior to amendment which read as under:

"Rule 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 good, any [manufacturer] or exporter of such goods may, within[two 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 in writing to the [Commissioner of Central Excise] having jurisdiction over the manufacturing unit, of the manufacturer exporter or, of the supporting manufacturer, as the case may be, 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".

11.2. The Commissioner (Appeals) and respondent on the other hand have relied upon amendment to Rule 6 as amended vide Notification No. 49/2010 - Customs (N.T.) dated 17.06.2010.

12. Government notes that the manufacturer or exporter may file application for fixation of brand rate under Rule 6 of Customs & Central Excise Duty Drawback Rules, 1995 if no rate is determined. As per the provisions of Rule 6(1) of the Customs & Central Excise Duty Drawback Rules, 1995, the application for determination of rate of drawback is required to be filed within 60 days for the date relevant. In the instant case, Government finds that the date of first shipping bill is 01.04.2010 thus the period of 60 days for made relevant expires on 30.05.2010 for the purpose of Rule 6 & 7 *ibid*. Further the proviso to said Rule 6(1) provides that Commissioner may if he is satisfied that the manufacturer or exporter was prevented by sufficient cause from filing the application within the aforesaid time, allow an extra time of 30 days. But the respondent could not furnish valid reason to the satisfaction of the Commissioner for the delay which prevented them from filing application within 60 days as stipulated.

13. Further, Government observes that the Commissioner (Appeals) while passing the order has relied on the Circular No. 13/2010-Cus dated 24.06.2010 which was issued clarifying the amendment made in Drawback Rules vide Notification No. 49/2010-Cus(NT) & 48/2010-Cus(NT) dated 17.06.2010 vide which the revised time limits for filing the claim has made within 3 months from the date of Let Export Order instead of 60 days as per previous time limit. The appellate authority held that the claim of the respondent will be governed by the new provisions where the claim can be filed within 90 days from Let Export Order and this time limit can be further extended by 3 months and 6 months.

13.1. Government notes that the Notification No. 49/2010 - Customs (N.T.) dated 17.06.2010 and the Circular No. 13/2010-Cus came into effect only from 17.06.2010 and 24.06.2010, whereas the impugned export was for the month of April 2010. As such, the time limit for filing application for fixation of Brand Rate of Drawback which came into effect only from 24.06.2010 cannot be extended to export of April 2010. Any action for claiming brand rate fixation will be governed by the provisions of law as it existed when such cause for claiming drawback arose i.e. export of goods. Further the Notification itself speaks in categorical terms that the amended Rule shall come into force from 17.06.2010 only. There is no mention in the Notification or the Circular that the amendment applies retrospectively. Rather the Notification speaks about the revised time limits for filing application for fixation of Brand Rate of Drawback, Supplementary claims of drawback and for claiming drawback under Section 74 of the Customs Act, 1962 and also incorporating a new feature in the rules that in all the cases an application fee equivalent to 1% of the FOB value of exports or Rs. 1,000/- whichever is less, shall be payable for applying for grant of extension by the AC/DC and an application fee of 2% of the FOB value of exports or Rs.2,000/- whichever is less, shall be payable for applying for grant of extension by the Commissioner. Therefore, the new time period prescribed by the amending Notification No. 49/2010-Cus(NT) dated 17.06.2010 cannot be made applicable for the

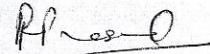
cases related to exports effected prior to issue of amending Notification. As such, contention of the Commissioner (Appeals) regarding the claim of the respondent will be governed by the new provisions laid down under said circular is not tenable.

13.2. Further, Government also observes that Hon'ble Supreme Court has laid down the principle in the case of ITC (Ltd) Vs CCE, New Delhi 2004 (171)ELT 433 (SC) and Paper Products Ltd Vs CC 1999 (112) ELT 765 (SC) that simple and plain wording of applicable statutory provisions as elaborated vide relevant Notifications/Circular are to be strictly adhered to and no liberal interpretation is permissible.

14. In view of above circumstances, Government finds that Commissioner (Appeals) has erred in allowing the appeal of the respondent on the basis of a Notification/Circular issued in the matter where the case related to exports affected prior to issue of amending Notification/Circular. Therefore, Government rejects the order of the Commissioner (Appeals) being devoid of merit and upholds the Order-in-Original passed by the Joint Commissioner (Technical), Central Excise Hqrs., Patna holding the application for brand rate fixation as time barred.

15. The revision application is thus allowed as above.

16. So, ordered.



(RIMJHIM PRASAD)

Joint Secretary to the Government of India

The Commissioner of Central Excise & Service Tax,
Central Revenue Building,
Birchand Patel Path,
Patna-800001.

Attested.

सहायक सचिव
उत्पादक शुल्क
अधीनस्थ (रा.स.)
Under Secretary (RA)

ORDER NO. 30/2015-CUS DATED 16.11.2015

Copy to:

1. The Commissioner of Central Excise & Service Tax, Central Revenue Building, Birchand Patel Path, Patna-800001.
2. The Commissioner (Appeals), Customs, Central Excise & Service Tax, Patna, 2nd Floor C.R. Building, Birchand Patel Path, Patna-800001.
3. The Joint Commissioner (Technical), Hqrs. Central Excise, Patna Central Revenue Building, Birchand Patel Path, Patna-800001.
4. M/s Indian Oil Corporation Ltd, Barauni Refinery, District Begusarai, Bihar.
5. Guard File.
6. PA to JS (RA).
7. Spare Copy.

ATTESTED


(Shaukat Ali)
Under Secretary (RA)

शुकात अली
Shaukat Ali
अधीन सचिव (रा)
Under Secretary (RA)