REGISTERED

SPEED POST

F.NO. 195/60-64, 578-579/12-RA-Cx
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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NEW DELHI-110 066

Date of Issue..16/01/13

ORDER NO. 34-40 /2013-CX DATED 15-01-2013 OF THE GOVERNMENT OF INDIA, PASSED BY SHRI D P SINGH, JOINT SECRETARY TO THE GOVERNMENT OF INDIA UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944.

SUBJECT	:	REVISION APPLICATION FILED UNDER SECTION 35 EE OF THE CENTRAL EXCISE ACT, 1944 AGAINST THE ORDER-IN-APPEAL No. as per table in para 1 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II Mumbai.
APPLICANT	:	M/s Unique Pharmaceutical Laboratories (A division of J.B. Chemicals & Pharma Ltd.), Mumbai
RESPONDENT	:	The Commissioner of Central Excise, Raigad

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ORDER

These revision applications are filed by M/s Unique Pharmaceutical Laboratories (A division of J.B. Chemicals & Pharma Ltd.), Mumbai against the orders-in-appeal Nos. passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II Mumbai as detailed below :-

S. No.	RA No./Applicant	O-I-A No./Date
1-4	195/60-64/12 M/s Unique Pharma Lab., Mumbai	US/384 to 388/RGD/2011 dated 31.10.11
5-6	195/518-519/12 M/s Unique Pharma Lab., Mumbai	US/107-108/RGD/2011 dated 17.02.12
7.	195/590/12 M/s Unique Chemicals, Mumbai	BC/377/BEL/11-12 dated 29.2.12

2. In these cases rebate claims are sanctioned to the extent of duty payable on exported goods on FOB value declared on shipping bills as the said value was accepted as transaction value in terms of section 4 of Central Excise Act 1944 by the original and appellate authority. The applicants had claimed rebate of duty paid on CIF value of export goods which was declared on the relevant ARE-I forms. In cases at Sr. No. 1-4 of table in para 1, Commissioner (Appeals) has allowed interest on delayed payment of rebate claims under section 11BB of Central Excise Act, 1944 whereas in the impugned orders-in-appeal at Sr. No. 5 to 7 of above table, there is no order as regard to payment of interest. Similarly in orders-in-appeal at Sr. No. 1 to 6, there is no order with regard to refund of differential duty paid on CIF value as stated ARE-1 form.

3. Being aggrieved with the impugned orders-in-appeal, the applicants have filed these revision applications on the following common grounds:-

3.1 The erstwhile Commissioner (Appeals), Mumbai-II Mr. Y.D. Banga had decided the issue and upheld in numerous orders that factory gate is not the place of removal in case of exports.

3.2 The rebate sanctioning authority has no authority to question the assessment carried out by the jurisdictional Excise authority and if there is a discrepancy then the action has to be referred to the jurisdictional Excise authority (certification carried out in the triplicate copy of the ARE-1) as per the CBEC circular binding on the department.

3.3 The Revisionary Authority, Government of India has ruled in case of Sterlite Industries as well as SPL Industries that duty paid on exports on transaction value, which includes freight and insurance is to be rebated. The said decision is binding as the same is not varied / reversed by any higher authority. The Revisionary Authority, GOI cannot deride its own decision. It cannot be the case of RA, GOI that the law is different for big cases like Sterlite and different interpretation prevails in the case of small exporters. The judicial discipline needs to be maintained. The CESTAT has ruled in umpteen cases in case of rebate that freight and insurance are part of the transaction costs and the said decisions have not been reversed by any higher authority. Once again, as per the settled principles of law the decision is binding and judicial discipline needs to be observed.

3.4 The definition of transaction value is not being applied as provisioned in the law but only the favourable part to the Revenue is being considered though the law has to be read and dealt with the way it is written.

3.5 The prosecution cannot be on the basis of assumption /presumption/figment of imagination. The lower adjudicating authority has not produced any evidence to show that difference between FOB value and ARE-1 value is on account of freight and insurance.

3.6 Presumptions and assumptions cannot lead to prosecutions. The difference between ARE-1 & FOB value is freight and insurance is simply a presumption /assumption/figment of imagination of the lower adjudicating authority and such unsubstantiated statements are of no value. Just see the freight and insurance amount and the difference being objected by the department. The fact is clear that the amount objected to by the department is not equal to the freight and insurance payable on the

transaction. Under the Customs Act, 1962, the FOB value of the export goods is assessable under Section 14 of the Customs Act 1962. Here, in this case, to arrive at the FOB value of exports the law prescribes that the exchange rate declared by the customs department under the customs notification has to be used to arrive at the FOB value of exports. The shipping bill take the exchange rate applicable as on the date of the Let Export Order. However, there is no such corresponding provision in the Central Excise Law. Therefore, it is not necessary that FOB value of export in the S/B will be the assessable value under ARE-1 for the payment of duty.

3.7 The Government of India's orders in Revision Nos. 1685/10-Cx dated 3.11.2010 and 1805/10-Cx dated 24.12.2010 in the cases of M/s SPL Industries, Faridabad and M/s Sterlite Industries (India) Ltd., Tuticorin respectively are of binding nature. Therefore going against these orders without citing the differences is not legally tenable. These orders are binding and need to be followed until the same are set aside / reversed by any higher authority.

3.8 The department has also taken a plea in the past that freight and insurance beyond the port of export cannot be part of the transaction value for the jurisdiction of the Central Excise Act, 1944 extends to the whole of India and not beyond. This statement is not legally tenable in respect of exports because the freight and insurance are part of the sale value directly attributable to it therefore freight and insurance cannot be exclude if not shown separately in the invoice as already explained in detail hereinabove. There is no provision in law, which says that freight payable for movement of goods to foreign destination is not chargeable to Excise.

3.9 We therefore pray that the impugned order may please be set aside because freight and insurance are part of the transaction value as accepted by the Revisionary Authority in case of SPL Industries and Sterlite Industries supra; the assessment order under the ARE-1 is not challenged (even in the case of self-assessment order needs to be challenged as decided in case of Maharashtra Cylinders supra) and the assessee has

followed the CBEC circular, which is binding on the department. Without challenging the assessment, there cannot be any possibility to deny the rebate claim in cash.

3.10 Applicant have also relied upon CBEC circular No. 510/06/2000-Cx dated 3.2.2000 and submitted that rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of duty paid on exported goods.

4. Applicants vide letter dated 18.12.2012 have filed additional written submission mainly reiterating the submissions made in the goods of revision applications. The following are the main submissions :-

4.1 In the present case the foreign buyer has placed order on CIF basis and the contract represents the composite price of the goods for the delivery of goods at the named destination in the contract. Thus in case of CIF contract, the expenditure on freight and insurance is includible for determination of transaction value as it is in connection with sale and by reason of sale. The freight and insurance is being charged on fixed amount basis/estimated value instead of actual freight and as per the definition of transaction value in the statute, freight and insurance i.e. outward handling charges is includible in the transaction value of the goods for determination of excise duty. Further, it is pertinent to point that the freight is not shown separately in the excise invoice pertaining to the removal of goods for the purpose of exports. The factory is not the place of removal in case of exports as held in various judgments because in case of exports, whether the goods are shipped on FOB/C&F/CIF basis, the goods have to go through the customs clearance and handed over to the shipping line under the ship's rail for export.

4.2 Explanation 2 of the Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000: The same is reproduced below for ready reference :

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purposes of determining the value of excisable goods .

Therefore, the Central Excise Valuation Rules in accordance with the statute categorically state that cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods and leaves no room for any devious interpretation. In case of exports, the factory is not the place of removal. The RA, GOI has taken a plea in several orders that freight and insurance beyond the port of export cannot be part of the transaction value because the jurisdiction of the Central Excise Act, 1944 extends to the whole of India and not beyond. This statement is not legally tenable in respect of exports because the freight and insurance are part of the sale value directly attributable to it therefore freight and insurance cannot be excluded if not shown separately in the invoice as already explained in detail hereinabove. The RA, GOI cannot go beyond the statute, which states that outward handling is part of the transaction value and come out with interpretation / read into the law, what is not specified therein. The transaction value is to be stated in the excise invoice for the removal of the goods and this is the value received in the exchange of goods excluding only the taxes and duties included in it. There is no provision in the law, which says that freight payable for movement of goods to a foreign destination is not chargeable to Excise. We fully agree that jurisdiction of the Central Excise Act, 1944 extends to the whole of India but this cannot lead to absurd interpretation that if the terms of the contract are for delivery at the factory/warehouse of the recipient abroad then too the freight and insurance are not part of the expense directly related to the sale and therefore not part of the transaction value, which is contrary to the definition of transaction value given in the Section 4 of the Central Excise Act, 1944.

4.3 The order-in-original does not given any information about the excess lying with the department. Even if it is accepted that this amount is not duty but then too this amount does not belong to the department in any case. Therefore it is in this context,

the appellant has stated that this amount cannot be pocketed by the Government in terms of Article 265 of the constitution and no authority including the CBEC can defy this. The constitutional right needs to be upheld by the Deputy Commissioner (Rebate). Whether the export is done by the manufacturer / merchant exporter, the excess amount cannot be misappropriated under any circumstances. In respect of duty payment, there can be only two possibilities (i) Duty paid in accordance with the legal provisions and in the case of rebate, the same should be given to the exporter in cash. (ii) The duty payment is not in accordance with the law therefore there is no duty payment and this is excess amount lying with the Government whether paid by mistake by the exporter and overlooked by the jurisdictional excise authority at the time of assessment of the ARE-1. Therefore under any circumstances, this amount cannot be retained by the department. The Deputy Commissioner should comprehend that CBEC circular 510/06/2000-Cx dated 3.2.2000 very clearly specifies that the rebate sanctioning authority is directed to effect the payment of rebate amount shown on the ARE-1 duly authenticated by the jurisdictional excise authority and if there is any discrepancy in valuation/duty payment then the matter has to be taken up with the jurisdictional excise authority as already pointed out above. As per the CBEC circular, the rebate sanctioning authority was required to take up the matter with the jurisdictional Excise authority and there would be no problem encountered in compliance with the legalities. Therefore, the Board has revised the correct procedure to be adopted for carrying out the legalities and this cannot be ignored. We reiterate that the circulars are binding on the department as held by the Apex court in case of 2004 (165) ELT 257 (SC) in case of Commissioner of Customs, Calcutta versus Indian Oil Corporation Ltd. Therefore, compliance with the CBEC circular is binding on the Deputy Commissioner (Rebate) and the refund of this excess payment cannot be denied in defiance of the CBEC circular / Supreme Court decision. The RA, GOI is therefore required to establish by way of a reasoned order that how violation of the Article 265 of the Constitution can be allowed to be permitted and the excess amount lying with the Government can be pocketed by the Government by just giving no decision in respect of this excess amount.

4.4 The valuation of the samples for the payment of the duty has to be carried in terms of section 4(1) (b) of the Central Excise Act 1944 because in case of samples, the goods are supplied free of cost and they are not sold. The same reads as :

In any case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Therefore, it is wrong on the part of the Deputy Commissioner (Rebate) to conclude that the value of the samples is zero because the statute in itself says that when goods are not sold , their value is to be determined in the prescribed manner.

4.5 The market value of the samples is not zero because duty payment is ad valorem at the time of the removal of the goods. The department cannot collect duty at the time of removal of the goods and then turn around and say that rebate is not allowed, when the goods are exported. This will result in an anomalous position of accumulated credit in respect of the samples exported, which is against zero rating of exports policy of the GOI.

4.6 There is no provision in the law that duty paid on the samples cannot be rebated. We have perused Notification No. 19/2004-CE(NT) dated 6.9.2004, once again and find no such provision relied upon by the department. Clause 2(e) categorically states that the market price of the excisable goods at the time of exportation is not less than the amount of rebate of duty claimed. The market price refers to what the goods will fetch if they are sold commercially and not realization, therefore the rebate cannot be denied because this condition is complied with. In the relevant shipping bills, the PMV appears therein and the same is not challenged. The PMV represents the present market value of the goods and not the FOB value shown in the shipping bills because FOB is the value to be realized and does not include the value of the goods supplied free. There is no other reason for the PMV to appear in the shipping bills. In case of duty drawback disbursements, the PMV is considered to determine whether the drawback is to be disbursed or not and not the FOB value of exports. The issue settled by the Apex Court in case of case law 2011 (263)ELT 641

(SC) in case of Medley Pharmaceuticals Ltd. versus Commissioner of Central Excise and Customs , Daman wherein it is held that valuation of physician samples distributed free is to be made based on manufacturing cost plus profit or on pro-rata basis. Further the Apex Court has also ruled that sale is not necessary condition for charging excise duty – Excise duty payable even in case of free supply - Section 3 of Central Excise Act, 1944. Therefore, there is no way that the rebate can be denied in respect of duty paid on physician's samples exported because sale / realization is not the criterion for the sanction of rebate. The Apex Court decision needs to be implemented.

5. Personal hearing was scheduled in these cases on 21.12.2012 at Mumbai. Shri Rajiv Gupta , Consultant along with Shri R. Narsimhan Sr. Manager appear for hearing on behalf of applicants and reiterated the grounds of revision application as well as additional submissions made in their written reply dated 18.12.2012.

6. Government has carefully gone through the relevant case records and perused the impugned orders. Since a common issue is involved in all these cases, so they are taken up for decision by this common order.

7. Government notes that in these cases the rebate of duty involved on FOB value of exported goods is sanctioned on the ground that said value was the transaction value of exported goods in terms of section 4 of Central Excise Act, 1944. Applicants have claimed that buyer had placed order on CIF basis and the contract represents the composite price and thus the freight and insurance is includible for determination of transaction value. They have contended in their revision applications that they are entitled for full rebate of duty paid on CIF value as mentioned on the relevant ARE-1 forms on the grounds mentioned in para 3 & 4 above.

8. Government notes that the said issue in the case of applicants was decided vide GOI order No. 124-135/12-Cx dated 14.02.12. The operative portion of said order is reproduced as under :-

"8. Government notes that the above first point of valuation, the issue already stands deliberated upon and decided in a number of cases including in case of M/s. Pidilite Industries Ltd., vide GOI Order

No.1536-1564/2011-Cx dated 18.11.2011, case of M/s Rohm & Hass (I) Pvt. Ltd., GOI order No.728-732/11-RA-CX dated 8.6.11, in the case of M/s Vanati Organics Ltd, GOI order No.573604/11-Cx dated 26.5.2011.

8.1 As per section 4(1) (a) of Central Excise Act, 1944 where duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of said goods such value shall.

(a) In a case where the goods are sold by the assessee, for delivery at time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.

(b) In other case, including the cases where the goods are not sold be the value determined in such manner as may be prescribed.

8.2 The word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows:

" 'Sale' and 'Purchase' with their grammatical variations and cognnate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."

8.3 Place of Removal has been defined under Section 4(3) ©(i),(ii), (iii) as:

(i) A factory or any other place or premises of production of manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;

(iii) A Depot, Premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

8.4 The rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) rules, 2000 is also relevant which is reproduced below:-

"Rule 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1. – "Cost of transportation" includes –

(i) The actual cost of transportation; and

(ii) In case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods."

8.5 Government observes that from the perusal of above provisions it is clear that the place of removal may be factory / warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place

outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it can not be beyond the port of loading of the export goods. Under such circumstances, the place of removal is the port of export where sale takes place. The appellate authority's observation that it is quite possible that the parties enter into any agreement under which the exporter is obliged to deliver the goods to the Shipping Company and in such a case the place of delivery may be the place of removal is not tenable. The Commissioner (Appeals) order holding that the price contracted for sale at the time and place of removal and reflected in invoice can be accepted in a situation where the contracted price is all inclusive of freight, insurance, then such CIF price will be transaction value is contrary to provision of Section 4 of Central Excise Act and is not correct since the freight, insurance incurred beyond the place of removal/sale is to be excluded from the value as it does not form part of transaction value in terms of Rule 5 of Central Excise Valuation rules, 2000. The GOI order No.271/05 dated 25.7.05 in the case of CCE Nagpur Vs. M/s Bhagirath Textiles Ltd. reported as 2006 (202) ELT 147 (GOI) has also held as under:-

"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on the CIF value.

8.6 Hon'ble Supreme Court in its order in Civil appeal No. 7230/1999 and CA No.1163 of 2000 in the case of M/s Escort JCB Ltd. Vs CCE Delhi reported on 2002 (146) ELT 31 (SC) observed (in para 13 of the said judgement) that

> "in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".

Further, CBEC vide it (Section) 37B order 59/1/2003-CX dated 03-03-2003 has clarified as under:-

> "7. 'Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [section 4(4)(b), sub-clauses (i),(ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended with effect from 1-7-2000, the point of determination of the assessable value under section 4 remained substantially the same. Section 4(3) (c) (i) [as on 1-7-2000] was identical to the earlier provision contained in section 4(4)(b)(i), section 4 (3)(c)(ii) was identical to the earlier provision in section 4(4)(b)(ii) and rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.
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> 8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."

8.7 Government observes that the respondent in their counter reply relied upon the CBEC circular 203/37/96-Cx dated 26.4.96 and circular No.510/06/2000-Cx dated 3.2.2000.In this regard, the Government observes that w.e.f. 1.7.2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act. Though the CBEC circular 203/37/96-Cx dated 26.4.96 was issued when transaction value concept was not introduced yet the said circular clearly states that AR4 value of

excisable goods should be determined under section 4 of Central Excise Act, 1944 which is required to be mentioned on the Central Excise invoices. Even now the ARE-1 value is to be the value of excisable goods determined under section 4 of Central Excise Act,1944 i.e. the transaction value as defined in section 4(3)(d) of Central Excise Act. CBEC has further reiterated in its subsequent circular No.510/06/2000-Cx dated 3.2.2000 that as clarified in circular dated 26.4.96 the AR4 value is to be determined under section 4 of Central Excise Act, 1944 and this value is relevant for the purpose of rule 12 and 13 of Central Excise Rules. The AR4 and rule 12/13 are now replaced by ARE-1 and rule 18/19 of Central Excise Rules, 2002. It has been stipulated in the notification No.19/04-CE(NT) dated 6.9.04 and the CBEC circular No.510/06/2000-Cx dated 3.2.2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provision of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

8.1 Government has held that rebate of duty paid on transaction value of goods determined under section 4 of Central Excise Act 1944 is admissible under rule 18 of Central Excise Rules 2002 read with Not. No. 19/04-CE(NT) dated 6.9.2004. Government had reiterated the findings of GOI order No.271/05 dated 25.7.2005 in the case of M/s Bhagirath Textiles 2006 (202) ELT 147 (GOI) wherein it was held that exporter is not liable to pay duty on CIF value of goods but duty is to be paid on transaction value determined under Section 4. Government notes that said issue in the case of applicants in GOI order Nos. 1274-1369/11-Cx dated 30.9.2011, 1631-1708/11-Cx dated 22.12.11 and 1008-1033/11-Cx dated 11.8.11.

8.2 Applicants have now relied heavily on CBEC Circular No. 510/06/2000-Cx dated 3.2.2000 and above GOI order No. 1685/10-Cx dated 3.11.2010 and 1805/10-Cx dated 24.12.2012 in the cases of M/s SPL Industries Faridabad and M/s Sterlite Industries (India) Ltd. Tuticorin respectively.

8.3 In the case of Sterlite Industries (I) Ltd. issue related to rebate of duty paid on supplementary invoices raised by foreign buyer on finalization of provisional values and duty amount paid was not reflected in the ARE-I as the invoices were raised subsequent

to exports. In that case, rebate of said duty paid on supplementary invoices was allowed by Government since transaction value was revised subsequently and the said claim was filed within one year from the date of export. In the said case, no issue of CIF value / FOB value was examined.

8.4 Similarly in the case of SPL Industries, Government in para 8 of its order had noted that the foreign remittances as per BRCs is equal to the ARE-1 value and therefore the order-in-appeal accepting the ARE-1 value as transaction value was upheld without examining the transaction value with respect to CIF/FOB value. In the said case, Government had not specifically examined the issue of transaction value with respect to CIF value / FOB value. Government has subsequently examined the issue of transaction value with respect to CIF value / FOB value in number of Revision Orders in the case of namely M/s Pidilite Industries Ltd., GOI order NO. 1536-1564/11-Cx dated 18.11.2011, M/s Rohm & Hass (I) Pvt. Ltd., GOI order No. 728-732/11-RA-Cx, M/s Vinati Organics Ltd. GOI order No.573-604/11-Cx dated 26.5.11, applicants case – GOI order No. 1274-1369/11-Cx dated 30.09.11, 1631-1708/11-Cx dated 22.12.11, 1008-1033/11-Cx dated 11.8.11, GOI Order No. 124-135/12-Cx dated 14.02.12. In all these orders a similar decision is taken. The similar decision taken in applicants case vide GOI Order No. 124-135/12-Cx dated 14.02.12 is also reproduced in para 8 above. Applicant is citing order of the year 2010 which cannot be made applicable to the present issue due to the reason stated above. Moreover, the issue is specifically dealt in the revision orders issued in the year 2011 and 2012 as mentioned above and the ratio of said orders is squarely applicable to this case. So it is wrong to contend that applicant is being given different treatment.

8.5 For applicability of the cited precedents "Government is of the opinion which is guided by the observations of Hon'ble Supreme Court in para 10 of the judgement in case of Escorts Ltd. vs. CCE Delhi-II 2004 (173) ELT 113 (SC) which inter alia stipulates precedent –circumstantial flexibility - One additional or different fact may make a world of difference between conclusion of two cases – Disposal of two cases by blindly placing

reliance on a decision, not proper - In para 11 of said judgment following observations are made :-

"11. The following words of Lord Denning in the matter of applying precedents have become locus classicus :-

" ...."*Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect in deciding such cases. One should avoid temptation to decide cases by matching the colour of one case against the colour of another .....*".

Therefore, there cannot be any strict statutory relied upon citation which can be taken as guiding precedents because each one of above citation have different background of factual merits pertaining to manufacturers manufacturing goods of different sub-headings following different set of Notifications, choosing different beneficial schemes and changing thereof in between a given financial year thereby leading to arise of different question of law.

8.6 Applicant has argued that freight and insurance incurred beyond the port of export cannot be excluded from transaction value on it not mentioned separately in the invoice. Here, applicant has argued contrary to GOI order mentioned in para 8.4 above and to the provisions of rule 5 of valuation rules 2000. Explanation 2 of said rule state that cost of transportation from factory to place of removal where factory is not the place of removal shall not be excluded for the purpose of determining value of excisable goods. As per discussion in para 8, the place of removal cannot be beyond the port of export. So the transportation cost, at the most upto port of export (the place of remnoval) can be included in the value.

8.7 Government observes that the CBEC Circular No.510/06/2000-Cx dated 3.2.2000 has also been relied upon by applicant. In this regard, the Government observes that w.e.f. 1.7.2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act and therefore said Circular issued prior to introduction of transaction value concept, cannot be strictly applied after 1.07.2000. As per para 3(b)(ii) of Notification No. 19/04-CE(NT) dated 6.09.04, the rebate sanctioning authority

has to satisfy himself that rebate claim is in order before sanctioning the same. If the claim is in order he shall sanction the rebate either in whole or in part.

8.7.1 The said para 3(b)(ii) is reproduced below :-

"3(b) Presentation of claim for rebate to Central Excise :-

(i) .....

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."

The said provisions of this notification clearly stipulate that after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or part as the case may be depending on facts of the case.

8.7.2 Government notes that said notification issued under Rule 18 of Central Excise Rules, 2002, prescribes the conditions, limitations and procedure to be following for claiming as well as sanctioning rebate claims of duty paid on exported goods. The satisfaction of rebate sanctioning authority requires that rebate claim as per the relevant statutory provisions is to be in order. He does not have the mandate to sanction claim of obviously excess paid duty and then initiate proceeding for recovery of the erroneously paid rebate claim. Therefore, the circular of 2000 as relied upon by applicant cannot supersede the provisions of Notification No. 19/04-CE(NT). Adjudicating authority has therefore rightly sanctioned the part rebate claim, and also rightly held that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated a voluntary deposit with the Government which is required to be returned to the assesses / respondents in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

8.8 Applicant has also contended that rebate of duty paid cannot be denied on the goods supplied free as samples. The free sample has no value as they are shown free in the Shipping Bills. As per Condition 2(e) of Notification No. 19/04-CE(NT) dated 6.09.04 if the market price of the excisable goods at the time of exportation is less than amount of rebate claimed, the rebate will not be admissible since the goods are free and therefore rebate on such goods is rightly denied under Rule 18 of Central Excise Rules, read with Notification 19/04-CE(NT) dated 6.09.04.

9. In view of above position, the rebate sanctioned in these cases by the lower authorities is in order and Government uphold the impugned order to this extent. The adjudicating authority has however held that excess paid duty i.e. duty paid on part of value exceeding transaction value is to be treated a voluntary deposit with Government and same is to be returned in the Cenvat Credit account from which said duty was paid. Adjudicating authority has directed the applicant to approach jurisdictional authorities for allowing re-credit in their Cenvat Credit account. In this regard, Govenrment directs the jurisdictional Central Excise authorities to allow the re-credit of said excess paid amount in their Cenvat Credit account.

10. As regards, payment of interest on delayed refund, Government observes that Hon'ble Supreme Court in the case of M/s Ranbaxy Laboratories Ltd. Vs. UOI 2011-TIOL-105-SC.Cx has as under :-

10.1 Government notes that on delayed payment of refund claims interest is paid under section 11BB of the Central Excise Act, 1944 after the expiry of three months of the date of receipt of application for rebate in the Divisional offices in terms of Section 11BB ibid. This is already decided by Hon'ble Supreme Court in the case of M/s Ranbaxy Laboratories Ltd. vs. UOI reported on 2011-TIOL-105-SC-CX has categorically held as under :

"9. It is manifest from the afore-extracted provisions that Section 11BB of the Act comes into play only after an order for refund has been made under Section 11B of the Act. Section 11BB of the Act lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B of the Act, then the applicant shall be paid interest at such rate, as may be fixed by the Central Government, on expiry of a period of three months from the date of receipt of the application. The Explanation appearing below proviso to Section 11BB introduces a deeming fiction that where the order for refund of duty is not made by the Assistant Commissioner of Central excise or Deputy Commissioner of Central Excise but by an Appellate Authority or the Court, then for the purpose of this Section the order made by such higher Appellate Authority or by the Court shall be deemed to be an order made under sub-section (2) of Section 11B of the Act. It is clear that the Explanation has nothing to do with the postponement of the date from which interest becomes payable under Section 11BB of the Act. Manifestly, interest under Section 11BB of the Act becomes payable, if on an expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Thus, the only interpretation of Section 11BB that can be arrived at is that interest under the said Section becomes payable on the expiry of a period of three months from the date of receipt of the application under Sub-section (1)of Section 11B of the Act and that the said Explanation does not have any bearing or connection with the date from which interest under Section 11BB of the Act becomes payable.

10. It is a well settled proposition of law that a fiscal legislation has to be construed strictly and one has to look merely at what is said in the relevant provision, there is nothing to be read in; nothing to be implied and there is no room for any intendment. (See: Cape Brandy Syndicate Vs. Inland Revenue Commissioners [1921] 1 K.B. 64 and Ajmera Housing Corporation & Anr. Vs. Commissioner of Income Tax (2010) 8 SCC 739 = (2010-TIOL-66-SC-IT).

11 .....

12. .....

13. .....

14. .....

15. In view of the above analysis, our answer to the question formulated in para (1) supra is that the liability of the revenue to pay interest under Section 11BB of the Act commences from the date of expiry

of three months from the date of receipt of application for refund under Section 11B(1) of the Act and not on the expiry of the said period from the date on which order of refund is made."

10.2 In another case of M/s Jindal Drugs, Government vide its GOI Order No. 247/2011-CX dated 17.03.11 passed in revision application No. 198/184/08-RA-CX filed by Commissioner Central Excise, Raigad against order-in-appeal No. SRK/455-460/RGD-08 dated 24.07.08 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II, had upheld the impugned orders-in-appeal and held that in terms of Section 11BB interest is payable after expiry of three months from the date of receipt of refund / rebate application. Department contested the said GOI Order dated 17.03.11 by filing WP No. 9100/2011 in Bombay High Court who in it's judgment dated 30.01.2012 has upheld the Government Order vide GOI Order No. 247/2011-CX dated 17.03.11. The observations of Hon'ble High Court in para 2,3 of said judgment are reproduced below:

> *"2. Counsel appearing on behalf of the Petitioner submitted that the entitlement of the Respondent to a rebate was crystallized only on 6 December 2007 when the notice to show cause was dropped by the Commissioner of Central Excise. The rebate claims were sanctioned within a period of three months thereafter by the Assistant Commissioner (Rebate) and hence, no interest was payable. On the other hand, it has been urged on behalf of the respondent that the law has been settled by the judgment of the Supreme Court in Ranbaxy Laboratories Ltd. vs. Union of India and consequently no interference in the exercise of the jurisdiction under Article 226 of the Constitution is warranted.*
>
> *3. The Supreme Court in its decision, in Ranbaxy (supra) considered the provisions of Section 11B and 11BB of the Central Excise Act, 1944 and held that Section 11BB lays down that in case any duty paid is found refundable and if the duty is not refunded within a period of three months from the date of receipt of the application to be submitted under sub-section (1) of Section 11B, then the applicant shall be entitled to interest at such rate as may be fixed by the Central Government. The Supreme Court observed that the explanation to Section 11BB introduces a deeming fiction to the effect that where the order for refund is not made by the Assistant Commissioner but by an appellate authority or the Court, then for the purposes of the Section the order passed by the appellate authority or the Court shall be deemed to be an order under sub-*

Section (2) of Section 11B. Having observed as aforesaid the Supreme Court also held that the explanation does not effect a postponement of the date from which interest becomes payable under Section 11BB and interest under the provision would become payable if on expiry of a period of three months from the date of receipt of the application for refund, the amount claimed is still not refunded. Hence, it is now a settled position in law that the liability of the Revenue to pay interest under Section 11BB commences from the expiry of three months from the date of receipt of the application for refund under Section 11B(1) and not on the expiry of the said period from the date on which an order for refund is made. The submission which has been urged on behalf of the revenue is directly in the teeth of the law as laid down by the Supreme Court. The order passed by the Commissioner (Appeals) granting interest and as confirmed by the revisional authority does not hence fall for interference under Article 226 of the Constitution. The Petition is accordingly dismissed."

10.3 In view of above position, the interest under Section 11BB of Central Excise Act 1944 is payable after expiry of three months from the date of receipt of refund / rebate application. In case of delayed refunds, the applicants are entitled for interest payment under Section 11BB.

11. The revision applications are therefore disposed of in terms of above.

12. So ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

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(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Revn)

Copy to:

1. The Commissioner of Central Excise, Raigad, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai – 400 614
2. The Commissioner of Central Excise & Customs (Appeals), Mumbai Zone-II, 3rd Floor, Utpad Shulk Bhavan, Plot No.C-24, Sector-E, Bandra-Kurla Complex, Bandra (E), Mumbai – 400 051.
3. The Assistant Commissioner (Rebate), Raigad, Plot No.1, Sector-17, Khandeshwar, Navi Mumbai – 400 614
4. PA to JS(RA)
5. Guard File.
6. Spare Copy

16/1

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