REGISTERED SPEED POST AD

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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. 198/01/WZ/18-RA/6386 Date of Issue: 28.08.2023

ORDER NO. 342/2023-CX(WZ)/ASRA/MUMBAI DATED 23.8.2023 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : Commissioner of CGST & Central Excise, Pune-I.

Respondent : M/s. Panacea Alloys Pvt. Ltd.,
KPCT, A Wing 201, 2nd Floor,
Fatima Nagar, Pune-411013.

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. PUN-EXCUS-001-APP-407-17-18 dated 05.10.2017 passed by the Commissioner (Appeals-I), Central Tax, Pune.

ORDER

This revision application has been filed by the Commissioner of CGST & Central Excise, Pune-I (hereinafter referred to as "the applicant" or "the Department") against Order-in-Appeal No. PUN-EXCUS-001-APP-407-17-18 dated 05.10.2017 passed by the Commissioner (Appeals-I), Central Tax, Pune in respect of M/s. Panacea Alloys Pvt. Ltd., KPCT, A Wing 201, 2nd Floor, Fatima Nagar, Pune-411013 (hereinafter referred to as "the respondent").

2. The respondent, ie. M/s. Panacea Alloys Pvt. Ltd., a Merchant Exporter exported goods and filed two rebate claims of Rs.3,40,323/- and Rs.1,53,072/- totally amounting to Rs. 4,93,395/-. The exported goods were manufactured by M/s. Union Batteries Pvt. Ltd., Plot No. J-258, 261-264, MIDC Bhosari, Pune-411 026 (herein after referred to as assessee/manufacturer) registered as Manufacturer with Central Excise having Registration No AAACU3340GXM002 and engaged in manufacture of Lead Acid Storage Traction Battery Cells falling under tariff Item No. 85072000 of the Central Excise Tariff Act, 1985. The said claims were filed in terms of Section 11B of Central Excise Act 1944 read with Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004 CE(NT) dated 06.09.2004.

3. Following the due process in law the adjudicating authority vide Order-in-Original No. P-II/CEX/ANWESH/BR-II/REB/21/2016-17 Dated 27.06.2016, observing that there is a difference between assessable value under Section 4 of the Central Excise Act, 1994 and FOB value of the exported goods sanctioned Rs. 4,87,314/- based on the FOB value and since the respondent did not have Cenvat Credit Account denied the cenvat credit of Rs. 6081/-. He further appropriated / adjusted the sanctioned amount against the Government dues pending from the assessee M/s. Union Batteries Ltd.

4. Being aggrieved with the above, the respondent preferred an appeal with the appellate authority, who, vide impugned appellate order, modified the Order-in-Original dated 27.06.2016 to allow the refund claim to the extent of Rs. 6081/- in cash.

5. Being aggrieved, the Department filed aforementioned revision application against the impugned Order in Appeal on the following grounds that: -

5.1 The order of Hon'ble Commissioner (Appeals-I) is challenging the very basis of grant of rebate and practice/ notification/rules being followed by the field formations for the grant of rebate on export of goods.

5.2. The Hon'ble Commissioner (Appeals-I) has ignored the provisions of Rule 18 of the Central Excise Rules 2002 and the notification No. 19/2004-CE (NT) dated 06.09.2004. The procedure for claim of rebate of duty paid on export goods is prescribed in Notification No. 19/2004-CE (NT) dated 6-9-2004 issued under Rule 18 of Central Excise Rules, 2002.

5.3 The Hon'ble Commissioner (Appeals-I) has failed to appreciate that as per Rule 18 of the Central Excise Rules, 2002 duty paid on the Transaction Value in terms of Section 4 of the Central Excise Act, 1944 is to be rebated. In the instant case transaction value was the FOB value appearing on the Shipping Bills where the duty paid as per ARE-I was higher than the Transaction value. As per Rule 18 of the Central Excise Rules, 2002 extra duty paid would constitute an amount erroneously paid which is liable to be refunded by allowing credit in the Cenvat Credit Account only in terms of Section 11B of the Central Excise Act, 1944. Any excess duty paid is required to be refunded in the manner it was paid as per Hon'ble Punjab and Haryana High Court in the case of M/s. Nahar Industrial Enterprises Ltd. v. UOI (2009 (235) ELT 22 (P&H)).

5.4. The judgment of Hon'ble Commissioner (Appeals-I) is Sub- silentio. The Hon'ble Commissioner (Appeals I) has overruled the settled law in following cases without specifically stating it is doing so:

(i) Nahar Industrial Enterprises Ltd. Vs. Union of India 2009 (235) E.L.T. 22 (P&H)

(ii) Order No. 1757-1767/2012-CX dated 18.12.2012 in F. No. 195/ 242-250/2011-RA-CX passed by Joint Secretary, Revisionary Authority, Department of Revenue, Ministry of Finance- IN RE: Sulzer India Ltd.-2014 (313)E.L.T. 929(GOI).

(iii) Order No. 1275/ 2013-CX dated 19.9.2013 in F.No. 195/ 1049/ 11-RA passed by Joint Secretary, Revisionary Authority, Department of Revenue, Ministry of Finance-IN RE: Narendra Plastic Pvt. Ltd. -2014 (313) ELT. 833 (G.O.I.)

(iv) Order Nos, 576-598/ 2013-CX dated 27.06.2013 in F. Nos. 195/ 1043-1048 / 11-RA & 195/1228-1244/11- RA passed by Joint Secretary, Revisionary Authority, Department of Revenue, Ministry of Finance IN RE: Aarti Industries Ltd. -2014 (312) ELT 872 (G.O.I.)

(v) Order No. 97/2014-Cx, dated 26.03.2014 in F. No. 195/ 126/ 2012-RA passed by Joint Secretary, Revisionary Authority, Department of Revenue, Ministry of Finance-IN RE: Sumitomo Chemicals India Pvt. Ltd. -2014 (308) E.LT 198 (G.O.I)

5.5. It is seen that w.e.f. 1-7-2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act. Though the C.B.E. & C. Circular 203/37/96-CX. dated 26-4-1996 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-I value is to be the value of excisable goods determined under Section 4 of Central Excise Act, 1944 ie. the transaction value as defined in Section 4(3)(d) of Central Excise Act C.B.E. & C. has further reiterated in its subsequent Circular No. 510/06/2000-CX, dated 3-2- 2000 that as clarified in circular dated 26-4-1996 the AR4 value is to be determined under Section 4 of Central Excise Act, 1944 and this value is relevant for the purpose of Rules 12 and 13 of Central Excise Rules. The AR4 and Rules 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. 19/2004-CE (NT) dated 6-9-2004 and the C.B.E. & C. 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 provisions 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.

5.6. The Hon'ble Commissioner (Appeals-I) erred in passing the OIA in disregard of instruction dated 10.04.1986 issued vide letter No. 209/21/85-CX 6 dated 10.04.1986.

6. A show cause notice was issued to the respondent under Section 35EE of Central Excise Act, 1944 to file their counter reply. However, the Respondent failed to make any submissions.

7. A Personal hearing was fixed on 13.10.2022, 03.11.2022, 09.12.2022 & 23.12.2022. Neither the applicant Department nor the respondent appeared for personal hearing or made any correspondence seeking adjournment of hearings despite having been afforded the opportunity on

more than three different occasions and therefore, Government proceeds to decide these cases on merits on the basis of available records.

8. Government has carefully gone through the relevant case records available in case files, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

9. Government notes that the Adjudicating authority in his order has observed that the respondent has paid excess excise duty at the time of export of their product; that the duty was required to be paid on the FOB Value and the amount of rebate claim pertaining to the said excess payment i.e. the difference between the ARE-1 value and FOB value was allowed in the form of CENVAT Credit. However, since the respondent did not have Cenvat Credit Account, denied the cenvat credit.

10. Government observes that Commissioner (Appeals), on the other hand has mainly relied on the disclaimer Certificate issued by the assessee/manufacturer to grant refund in favor of the respondent to arrive at a conclusion that the duty paid through the actual credit or deemed credit account on the goods exported must be refunded in cash.

11. Government observes that Adjudicating authority in his order has observed that the subject goods have been exported directly from the factory of the assessee/manufacturer. The relevant statutory provisions for determination of value of excisable goods have been duly examined in GOI order No.97/2014-Cx dated 26.03.2014 In Re: Sumitomo Chemicals Pvt. Ltd. [2014(308) E.L.T. 198 (G.O.I.)] which are reproduced below for proper understanding of the issue of valuation:-

> ***8.1*** *As per basic applicable 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 *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 cognate 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)(c)(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 up to 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 cannot 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 GOI Order No. 271/2005, dated 25-7-2005 in the case of CCE, Nagpur v. M/s. Bhagirth Textiles Ltd. reported in 2006 (202) E.L.T. 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 *Supreme Court in its order in Civil Appeal No. 7230/1999 and CA No. 1163 of 2000 in the case of M/s. Escorts JCB Ltd. v. CCE, Delhi reported in 2002 (146) E.L.T. 31 (S.C.) observed (in para 13 of the said judgment) 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 3-3-2003 has clarified as under :-

Assessable value' "7. 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.

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."

12. As regards rebating in cash, only the duty worked out on FOB value in respect of the rebate claims treating it as a transaction value Government relies on GOI Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] wherein GOI held that:

"9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above. Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

Government therefore, holds that the excess duty paid by the applicant's manufacturers over and above the FOB value has to be re-credited in the Cenvat Credit account from where it was paid subject to compliance of the provisions of Section 12 B of Central Excise Act, 1944.

13. Government observes that as per para 3(b)(ii) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, 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. 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 in part as the case may be depending on facts of the case. 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 in order.

14. Government accordingly, sets aside the impugned order-in-appeal so far as it relates to allowing the refund claim of Rs. 6081/- in cash and allows the revision application filed by the applicant.

Shrawan 23/8/23

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

ORDER No. 342/2023-CX(WZ)/ASRA/MUMBAI DATED 23.8.23

To,
Commissioner of Central Goods and Service Tax,
Pune-I Commissionerate,
GST Bhavan, 41/A Sasoon Road,
Opp. Ness Wadia College,
Pune-411 001.

Copy to:

1. M/s. Panacea Alloys Pvt. Ltd., KPCT, A Wing 201, 2nd Floor, Fatima Nagar, Pune-411013
2. Commissioner, Central GST, (Appeals-I) Pune, "F" wing, 3rd Floor, GST Bhavan, 41/A, Sassoon Road, Pune 411001.
3. Sr. P.S. to AS (RA), Mumbai.
4. Spare Copy.