

REGISTERED
SPEED POST



F.No. 195/189-191/12-RA-CX
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue..27/11/14

Order No. 359-361/14-cx dated 26-11-2014 of the Government of India, passed by Smt. Archana Pandey Tiwari, Joint Secretary to the Government of India, under Section 35 EE of the Central Excise Act, 1944.

Subject : Revision Applications filed under section 35 EE of the Central Excise, against the Orders-in-Appeal No./515-517/RGD/ dated 30.12.2012 passed by the Commissioner of Central Excise, (Appeals-II), Mumbai

Applicant : United Phosphorus Ltd., Mumbai

Respondent : CCE Raigad

Order

These revision applications have been filed by the applicant M/s. United Phosphorus Ltd., Warli, Mumbai, a manufacturer exporter with respect to Order-in-Appeal No./515-517/RGD/ dated 30.12.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai with respect to Orders-in-Original passed by Deputy/Assistant Commissioner(Rebate), Central Excise, Raigad.

2. In all these cases, the applicant filed rebate claim of duty paid on exported goods under Rules 18 of central excise rules, 2002 read with Notification No. 19/2004-Cx(NT) dated 06.09.2004. In these rebate claims, the original authority sanctioned the rebate claims. The said Orders were reviewed by the Jurisdictional Commissioner, Central Excise and appeals were filed before Commissioner (appeal) on the grounds that the assessable value is higher than FOB value. The extra amount paid by the assessee on freight and insurance (if any) being duty, has to be treated as extra- payment. Hence the rebate has to be restricted to the duty paid on the FOB value. The appellate authority accepted the appeals of the department and set aside the impugned orders-in-originals.

3. Being aggrieved by the impugned orders-in-appeal, the applicant has filed these revision applications under Section 35EE of the Central Excise Act, 1944 before Central Government on the following grounds:

3.1. It is submitted that the Commissioner (Appeals), failed to appreciate that the applicant being the manufacturer, supplied the material to the merchant exporters at the agreed price with applicable duty. If the FOB declared by the merchant exporters is less, the applicant cannot be held responsible as the applicant has no control on the merchant exporters and they cannot control the merchant exporters selling price in the competitive overseas market. The Commissioner (Appeals) failed to appreciate the letter given by the merchant exporters stating how the FOB value was worked out less than that of the assessable value.

3.2 The impugned order of the Commissioner (Appeals) is entirely without jurisdiction and without the authority of law in as much as it is clearly contrary to the Order-in-appeal No. YDB/616 to 622/RGD/2010 dated 24.09.2010 passed by then Commissioner of Central Excise (Appeals) in the Applicant's own case, dismissing the Appeals filed by the Department against seven Orders-in-Original involving the identical issue.

3.3 It is submitted that the Hon'ble Rajasthan High Court in the case of Commissioner V/s. Sun City Alloys Pvt. Ltd. reported 2007 (218) E.L.T.174 (Raj.), dismissed the petition filed by the Commissioner, holding that, if no duty was leviable and the assessee was not required to pay the duty still if he has paid the duty which has been received by the Commissioner, they cannot retain the same on any ground and must refund the amount received from assessee.

3.1.4 The applicant has also relied upon various case laws in favour of their contention.

4. Personal hearing scheduled in this case on 16.9.2014 was attended by Shri Mihir Mehta, Chartered Accountant on behalf of applicant and he reiterated grounds of revision application.

5. 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.

6. Government observes that original authority sanctioned the rebate claims. The said Orders were reviewed by the Jurisdictional Commissioner, Central Excise and appeals were filed before Commissioner (appeal) on the ground that the assessable value is higher than FOB value. The extra amount paid by the assessee on freight and insurance (if any) being duty, has to be treated as extra-payment. Hence the rebate has to be restricted to the duty paid on the FOB value. The appellate authority accepted the appeals of the department and set aside the impugned orders-in-originals. Now, the applicant has filed these revision applications on grounds mentioned in para (3) above.

7. Government observes that the department sought to restrict rebate claims to duty paid on FOB value. The applicant gives various submissions in favour of their contention. Now, Government proceeds to examine the issue in light of relevant statutory provisions:

7.1 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.

7.2 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 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."

7.3 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.

7.4 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."

7.5 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.

7.6 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".

8. In view of above, it is evident that 'place of removal' is critical to decide the transaction value. In these cases, there is no categorical findings by lower authorities to mention 'place of removal'. Hence, Government finds it necessary that 'place of removal' may be decided by original authority before reaching at conclusions on transaction value. As such, the cases need to be remanded back to decide afresh after deciding 'place of removal'.

9. In view of above discussions, Government sets aside the impugned orders-in-appeal and remands the same back to original authority to decide the same afresh in view of observations made in para 8 above.

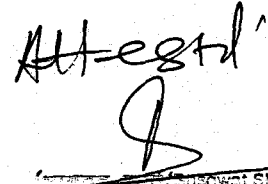
10. Revision applications are disposed off in above term.

11. So, ordered.


26/11/14

(Archana Pandey Tiwari)
Joint Secretary (Revision Application)

M/s United Phosphorus Ltd.
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(Anisgwot Sharma)
Joint Secretary (Revision Application)
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Ministry of Finance (Dept. of Rev.)
भारत सरकार/Govt. of India
नई दिल्ली / New Delhi

ORDER NO. 359-36 / 2014-CX DATED 26-11-2014

Copy to:

1. Commissioner of Central Excise, Customs & Service Tax, Raigad Commissionerate, Plot No. 1, Kendriya Utpad Shulk Bhavan, Sector-17, Khandeshwar, Navi Mumbai-410614.
2. Commissioner of Central Excise (Appeals-II), Mumbai, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra(E), Mumbai-400 051.
3. The Deputy Commissioner of Central Excise (Rebate), Raigad Commissionerate, Ground Floor, Kendriya Utpad Shulk Bhavan, Plot No. 1, Sector-17, Khandeshwar, Navi Mumbai-410206.
4. PA to JS(RA)
5. Guard File
6. Spare Copy.

ATTESTED



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