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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
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.195/790-792/2012-RA/4625 Date of Issue:

ORDER NO. 37-39 /2019-CX (WZ)/ASRA/MUMBAI DATED 20.09.2019 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicants : M/s Garden Silk Mills

Respondent : Commissioner of Central Excise, Raigad.

Subject : Revision Application filed, under Section 35EE of the Central Excise Act, 1944 against the Order-in-Appeal Nos. US/334-336/RGD/2012 dated 22.05.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai

ORDER

The Revision Application has been filed by M/s Garden Silk Mills, Surat (hereinafter referred to as "the Applicant") against the Order-in-Appeal Nos. US/334-336/RGD/2012 dated 22.05.2012 passed by the Commissioner of Central Excise (Appeals-II), Mumbai

Sl. No.	Rebate Claim No & Date	Amount claimed (Rs)	Order-in-Original & dt	Amount Sanctioned (Rs)	Order-in-Appeal No. & dt	
1	06 claims dt 16.11.2011	84,72,281	1958/11-12/DC(Rebate) /Raigad dt 31.01.2012	83,90,859	Appeal rejected	OIA No. US/334-336/RGD/2012 dated 22.05.2012
2	05 claims dt 16.12.2011	13,45,930	2054/11-12/DC(Rebate) /Raigad dt 10.02.2012	13,35,295	Appeals are partly allowed	
3	04 claims dt 04.08.2011	41,82,114	2220/11-12/DC(Rebate) /Raigad dt 23.02.2012	41,48,106		

2. The issue in brief is that the Applicant manufactured and exported Polyester chips and then filed rebate claim for the duty paid on the same in terms of Rule18 of the Central Excise Rules, 2002 (herein after 'CER') :

2.1 In r/o of Sr. 1, 2 & 3, the Applicant had filed rebate claims (details in Para 1 above) and vide their letter dated 22.11.2011 had requested to sanction the rebate on FOB value if CIF value is not acceptable and requested for re-credit of the duty of balance portion in their Cenvat account register. The Deputy Commissioner(Rebate), Central Excise, Raigad vide Order-in-

Original No. 1958/11-12/DC(Rebate)/Raigad dated 31.01.2012 sanctioned Rs. 83,90,859/-, No. 2054/11-12/DC(Rebate)/Raigad dt 10.02.2012 sanctioned Rs. 13,35,295/- and No. 2220/11-12/DC(Rebate)/Raigad dt 23.02.2012 sanctioned Rs. 41,48,106/- as rebate are restricted proportionate to FOB value and that the request for re-credit of the duty of balance portion was out of the jurisdiction of the Maritime Commissioner.

2.2 Aggrieved with 03 Order-in-Originals, the Applicant filed appeal with the Commissioner of Central Excise (Appeal-II), Mumbai who vide Order-in-Appeal No. US/334-336/RGD/2012 dated 22.05.2012 in appeal r/o of Sr.No. 1 was rejected and appeals in r/o 2 & 3 was partly allowed on the grounds that interest will be payable for the delayed refund .

3. Aggrieved, the Applicant then filed 03 Revision Application on the following grounds :

3.1 That the impugned order is bad in law and is also contrary to the provisions of the Central Excise Act, 1944 and / or Customs Act, 1962 and the Rule made there under and also the provisions of the other laws applicable to the issues involved in the appeal. The concerned show cause notice is also ab initio void, without jurisdiction and authority and also vitiated on account of limitation prescribed under the statute.

3.2 That according to Rule 18 of the CER, the rebate claim facility is available for the entire amount of duty actually paid on the materials used in the manufacture of export goods or duty paid on the export goods themselves. It is not the department's that they have claimed anything more than or in excess of the amount of duty actually paid.

3.3 That higher assessable value might result in receipt of excess duty by the department but as long as the Appellants have claimed rebate of duty actually paid by them, there is no extra benefit accrued to them or there is no revenue loss incurred by the Government. The whole case is entirely a revenue neutral exercise. The CBEC have clarified in Circular No. 203/37/96-CX dated 26.04.96 that *"it is the Assessable Value determined under Section 4 of the Central Excise Act,. 1944 which is required to be mentioned on AR4 and the corresponding invoice issued under Rule 52A. This value is relevant for the purpose of Rule 12 & 13 of the Central Excise Rules, 1944. FOB value is relevant for the Customs purposes and other schemes line Drawback Exports under DEEC, etc."*

3.4 that Rule 18 of the CER speaks of rebate of duty paid on the excisable goods and duty paid on the materials used in the manufacture to export goods, It does not speak of the duty payable or that ought to have been paid.

3.5 That in the Board Circular No. 278/112/96-CX dated 11.12.96, Circular No. 641/32/2002-CX dated 26.06.2002 and Circular No. 60/1/2006-CX dated 13.01.2006, it is clarified that the Government intention has always been to make duty incidence Nil in case of export and so none of the duties leviable uner any act of parliament is required to be paid in respect of exports.

3.6 That the Board Circular No 510/06/2000-CX dated 03.02.2000 clearly provides that the duty element shown on AR-1 has to be rebated if the jurisdictional Range Officer certifies it to be correct. It is further clarified that there is no question for re-qualifying the amount of rebate by the rebate sanctioning authority. It is also clarified that the rebate sanctioning authority should not examine the correctness of assessment but should examine only the

admissibility of rebate of the duty paid on the export goods covered by the claim.

3.7 That the above CBEC Circulars are fully binding on the department and the department cannot contend contrary to the instruction/ direction conveyed in such circulars. In this they relied upon the following judgments :-

(i) CCE Vs M.F. Rings & Bearing Races Ltd [2000 (119) ELT 239(T);

(ii) Siddhartha tubes Ltd Vs CCE [1999 (114) ELT 1000 (T).

3.8 They prayed to set aside the impugned order with consequential relief.

4 A personal hearing in this was held on 20.08.2019 which was attended by Shri Willngdon Christian, Advocate on behalf of the Applicants. The Applicants stated that in the FOB & CIF value difference, extra duty was not given as rebate. It has been allowed by RAs in the previous orders and Gujarat High Court in their own case and submitted written submissions. The Appellant requested that the amount should be sanctioned in cash in terms of Section 142(3) of CGST Act, 2017.

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. On perusal of records, the Applicants has manufacturing unit at Surat and their final goods were exported from JNPT, NhavaSheva, Raigad. In Sl.No. 1, 2 &,3 the Appellant had filed rebate claims under Rule 18 of the CER read with Notification No. 19/2004-CE(NT) dated 06.09.2004 for claiming rebate on their finished goods which was exported after payment of duty. The Original

Adjudicating Authority then sanctioned the rebate claims on FOB value totaling to Rs. 1,38,74,260/- , and rejected totaling to Rs. 1,26,065/- on the ground that CIF value cannot be transaction value and for that matter freight and insurance beyond the port of export cannot be the part of transaction value and moreover any expenditure incurred beyond the international borders of India cannot be a part of valuation under Central Excise Act, 1944 in view of the provisions of Section 1 of Central Excise Act, 1944 wherein the jurisdiction of the said Act extends to the whole of India and not beyond. The Appellant then filed 03 Appeals for the balance amount in their rebate claims which was rejected by the Commissioner(Appeal). Hence the Applicant then filed the current 03 Revision Applications total amounting to Rs. 1,26,065/- . The details are as given below:

Sr.No.	Amount claimed (Rs)	Order-in-Original & dt	Amount Sanctioned (Rs)	Amount not sanctioned (Rs.)	OIA No. & dated
1	84,72,281	1958/11-12/DC(Rebate)/Raigad dt 31.01.2012	83,90,859	81,422	OIA No. US/334-336/RGD/2012 dated 22.05.2012 Appeal rejected
2	13,45,930	2054/11-12/DC(Rebate)/Raigad dt 10.02.2012	13,35,295	10,635	
3	41,82,114	2220/11-12/DC(Rebate)/Raigad dt 23.02.2012	41,48,106	34,008	
Total	1,40,00,325	03 Revision Applications	1,38,74,260	1,26,065	

7. In this regard, Government observes that the identical issue has been decided by Government vide Revisionary Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. reported in 2014 (308) E.L.T. 198 (G.O.I.). While deciding the issue Government, in its aforesaid Order discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section

2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under :-

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 :-

"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.

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."

The Government also observed in its aforesaid Revision Order No. 97/2014-Cx, dated 26-3-2014 in Re: Sumitomo Chemicals India Pvt. Ltd. that

"it has been stipulated in the Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004 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 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. 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. v. UOI reported in 2009 (235) E.L.T. 22 (P&H).

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. Government also places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016 in the Applicant's own case - In RE:Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujart High Court] where in it was held that

"9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner does not dispute the stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If therefore, the petitioner's request was for re-credit of such amount in Cenvat account, the same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate application for such purpose. The Government of India itself in case of Balkrishna Industries Ltd. (supra), had substantially similar circumstance provided as under :

"8. In this regards, Government observed that the revisionary authority has passed a number of orders wherein it has been held that the rebate of duty is to be allowed of the duty paid the transaction value of the goods determined under Section4 of the Central Excise Act, 1944 and the rebate on the amount of duty paid in respect of post clearances expenses like freight and insurances may be allowed as recredit entry in their cenvat account. Since the Government cannot retain the amount collected without any authority of law and the same has to be returned to the applicant in the manner it was paid. Hence, Government observes that the applicant is entitled for the take (sic) credit in their cenvat account in respect of the amount paid as duty on freight & insurance charge. The applicant was not

even required to make a request with the department for allowing this recredit in their cenvat account. The adjudicating officer/ Commissione(Appeals) could have themselves allowed this instead of rejecting the same as timebarred."

10. In the result, the respondents are directed to recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

9. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case.

10. In view of the foregoing discussion, Government holds that in this case the duty was paid on CIF value and therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied to the applicant. Applicant has contended any excess duty paid by the assessee has to be returned to them as the department is not authorized by law to retain the same with themselves and in view of this the re-credit of the balance duty should be allowed.

11. In view of above, Government finds that the excess paid amount of duty which is not held admissible for being rebated under Rule 18 of CER, 2002, is to be allowed as re-credit back in the Cenvat credit account subject to compliance of provisions of Section 12B of Central Excise Act, 1944.

12. Hence, Government holds that the total excess paid amount of duty in respect of the 03 Revision application i.e Rs. 1,26,065/- /-(Rupees One lakh Twenty Six Thousand and Sixty Five only) (details as per Para 6 above) which are not held admissible for being rebated under Rule 18 of CER, 2002, are to be allowed to the Applicants as re-credit in their Cenvat credit account. Under

such circumstances, Government sets aside the impugned Order-in-Appeal dated 22.05.2012.

13. Revision Applications are allowed in terms of above.

14. So, ordered.

(SEEMA ARORA)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India.

ORDER No. 37-39 /2019-CX (WZ)/ASRA/Mumbai DATED 20.09.2019.

To,
M/s Garden Silk Mills,
Village- Jolwa,
Tal-Palsana,
Surat

Copy to:

1. The Maritime Commissioner, Central Excise, Raigad
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.