

REGISTERED SPEED POST



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.195/55/15-RA,195/56/15-RA,
195/154/15-RA/1986

Date of Issue: 20/11/18

ORDER NO. 374-376/2018-CX (WZ)/ASRA/MUMBAI DATED 30.10.2018 OF THE GOVERNMENT OF INDIA PASSED BY SHRI ASHOK KUMAR MEHTA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Sr. No.	Revision Application No	Applicant	Respondent
1	195/55/15-RA	M/s Hindalco Industries Ltd.	Additional Commissioner of Central Excise, Raigad
2	195/56/15-RA	M/s Hindalco Industries Ltd	Additional Commissioner of Central Excise, Raigad
3	195/154/15-RA	M/s Hindalco Industries Ltd	Additional Commissioner of Central Excise, Raigad

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Orders-in-Appeal No.

1. CD/44/RGD/2014 dated 18.11.2014,
 2. CD/42/RGD/2014 dated 18.11.2014, and
 3. CD/160/RGD/2015 dated 16.03.2015
- respectively, passed by the Commissioner of Central Excise, Mumbai



ORDER

The following Revision Applications have been filed by M/s Hindalco Industries Ltd. (hereinafter referred to as 'the applicant) against the Orders-in-Appeal, detailed in table below passed by Commissioner of Central Excise (Appeals), Mumbai

Sl. No.	Revision Application File No.	Order-in-Original No. & date	Order-in-Appeal No. & date	Demand Confirmed on account of erroneous of rebate claim Sanctioned. (Rs.)
1	195/55/15-RA	Raigad/ADC/ 73 to 78 (DL)/13-14 dated 31.10.2013	CD/44/RGD/2014 dated 18.11.2014	4,19,03,845/-
2	198/56/15-RA	Raigad/ADC/ 79 (DL)/13-14 dated 31.10.2013	CD/42/RGD/2014 dated 18.11.2014	5,02,630/-
3	198/154/15-RA	Raigad/ADC/ 258 (DL)/13-14 dated 11.03.2014	CD/160/RGD/2015 dated 16.03.2015	583,52,934/-
			Total	5,07,59,409/-

2. The issue involved in all the above revision applications is the same. Brief facts of the case is that the applicant are inter alia, engaged in the manufacture of copper products falling under Chapter 74 of the First Schedule to the Central Excise Act, 1985. The applicant cleared the said goods for export:

3. The price of copper in the international market is governed by London Metal Exchange (LME). Therefore, at the time of export, the applicant paid excise duty on the goods on the provisional assessable value (in terms of Rule 7 of the Central Excise Rules, 2002) which was inclusive of freight and insurance i.e. CIF value. Subsequently, at the end of the month or after transation of QP opted by buyer, the final assessable value (inclusive of freight & insurance) is derived by the Applicants. On deriving the final



assessable value, the Applicants raised supplementary invoice for the differential value and paid excise duty on the same.

3. The Applicants had filed rebate claims under Rule 18 of the Central Excise Rules, 2002 claiming rebate of the entire duty paid on the goods exported. Out of the total rebate claims filed, the applicant had totally received Rs.257,71,93,037/- (Rupees Two Fifty Seven Crores Seventy One Lakh Ninty Three Thousand Thirty Seven only) and an amount of Rs.33,10,877/- (Rupees Thirty Three Lakh Ten Thousand Eight Hundred Seventy Seven) was disallowed on account of difference between FOB Value & CIF value. The details of the Orders passed by Maritime Commissioner, Raigad are as under:

Sl. No	Order-in-Original No. & date	Period of export	Amount of rebate sanctioned (Rs.)	Amount of rebate disallowed on account of difference between FOB value & CIF value. (Rs.)
1	2311/11-12/DC (Rebate) Raigad dated 29.2.2012	November 2011& December 2011	43,42,83,405/-	3,95,036/-
2	1208/11-12/ DC (Rebate) Raigad dated 18.11.2011	May 2011 & June 2011	13,71,36,884/-	87,526/-
3	1526/11-12/ DC (Rebate) Raigad dated 22.12.2011	July 2011 & August 2011	25,75,63,875/-	2,92,818/-
4	1530/11-12/ DC (Rebate) Raigad dated 22.12.2011	August 2011 & September 2011	33,75,56,869/-	3,58,663/-
5	2005/11-12/ DC (Rebate) Raigad dated 7.2.2012	October 2011 & November 2011	23,82,65,351/-	3,36,089/-
6	1927/11-12/ DC (Rebate) Raigad dated 28.1.2012	August 2011 to October 2011	48,14,31,654/-	10,68,167/-
7	1988/11-12/ DC (Rebate) Raigad dated 31.1.2012	October 2011 &. November 2011	17,94,67,138/-	1,46,366/-
	2478/11-12/DC (Rebate) Raigad dated 20.3.2012	November 2011 & December 2011 and	51,14,87,861/-	6,26,212/-



		January 2012		
		TOTAL	257,71,93,037/-	33,10,877/-

4. The Department filed eight appeals against the aforesaid OIOs, on the following grounds:-

There is a difference in the value of the goods shown in the supplementary invoices and the FOB value shown in the Shipping Bill. In all, the 62 rebate claims considered in the Order in Original the FOB value is lower than the assessable value mentioned in the supplementary Invoices. As per the law laid down by the various judgments of the Tribunal, Freight and Insurance Charges and any Expenditure incurred beyond the International Borders of India cannot be part of the Transaction value and hence the rebate under Section 11 B has to be restricted to the FOB Value. Therefore, the rebate of duty paid on such value over and above FOB value is not the duty of Central Excise but it is to be treated as "Excess Payment".

The Rebate in terms of Rule 18 of Central Excise Rules, 2002, is the rebate of Central Excise duty paid on the exported goods. Hence, the sanction of rebate of such "Excess Payment" is in violation of Rule 18 of Central Excise Rules, 2002. The same is recoverable from them under Section 11 A of the Central Excise Act, 1944 along with the interest under Section 11 AA of the Central Excise Act, 1944. The amount involved in the eight appeals was Rs.5,07,59,409/-.

5. Simultaneously, Additional Commissioner, Raigad issued eight protective demand cum show cause notices to recover excess rebate sanctioned for an amount of Rs.5,07,59,409/-(Rupees Five Crore Seven Lakh Fifty Nine Thousand Four Hundred and Nine).

The Department's appeals were upheld by the Commissioner (Appeals) Order-in Appeal No US/704 to 710/RGD/2012 dated 25.10.2012 and Appeal No BC/492/RGD/(R)/2012-13 dated 31.12.2012. Being aggrieved by these orders of Commissioner (Appeals), the applicant filed



eight revision applications before the Revisionary Authority, Central Government.

7. GOI vide common Order No.40-47/2016-Cx dated 10.03.2016 rejected the Revision applications filed by the applicant and upheld the Orders in Appeal.

8. Against the rejection GOI order dated 10.03.2016, the applicant filed Writ Petition No. 11403 of 2016 before Hon'ble Bombay High Court.

9. Based on Commissioner (Appeals) order dated 25.10.2012 mentioned supra, the eight protective demands cum Show cause notices were confirmed by the Additional Commissioner, Raigad vide three orders dated 31.10.2013, 31.10.2013 & 11.03.2014 mentioned at Table at para 1 above, along with demand of interest under Section 11AB of Central Excise Act, 1944. Against these three orders that the applicant has filed the instant three Revision Applications mainly on the following grounds:-

- Additional Commissioner of Central Excise, Raigad issued eight protective demand cum show cause notices dated 27.4.2012, 29.10.2012, 29.10.2012, 29.10.2012, 1.11.2012, 1.11.2012, 1.11.2012, 1.11.2012 and 21.11.2012, with proposal to recover the alleged excess rebate claim erroneously sanctioned to the applicant in terms of the Order-in-Appeal dated 25.10.2012 & Order-in-Appeal dated 31.12.2012.
- In this protective demand proceedings the department sought to recover the alleged excess rebate amount of Rs.5,07,59,409/- (Rupees Five Crore Seven Lakh Fifty Nine Thousand Four Hundred and Nine) erroneously refunded to them. It was alleged in the protective show cause notices that the sanction of amount of alleged excess rebate to the Petitioners is in violation of Rule 18 of Central Excise Rules, 2002.

Refuting all the allegations in the show cause notices, they filed detailed replies against the aforesaid protective show cause notices vide their letter dated 05.04.2013 & 21.10.2013 wherein they, inter



alia, submitted that under the guise of denying the rebate of duty paid on freight and insurance portion, the revenue has sought to deny the rebate of duty paid in supplementary invoices raised for upward revision of prices of goods exported. The Petitioners submitted that difference in provisional FOB value and final FOB value pertains to the upward revision in prices of goods exported.

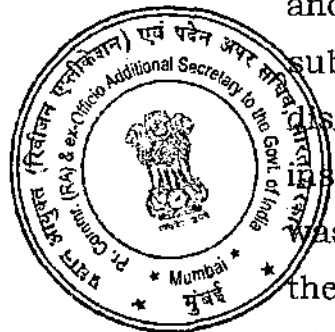
- However, without considering the submission made by them, the Additional Commissioner of Central Excise vide Order-in-Original dated 31.10.2013 & Order-in-Original dated 11.3.2014 confirmed the entire demand proposed in the above protective show cause notices. The Additional Commissioner blindly relied on the earlier Order-in-Appeal and held that difference in the provisional FOB value and final FOB value pertains to the freight and insurance charges incurred beyond the port of export and the same cannot form part of Transaction value.
- Aggrieved by the aforesaid Orders-in-Original, the Petitioners filed an appeal before the Commissioner (Appeals), Mumbai.
- The Commissioner (Appeals) vide Order-in-Appeal No. CD/42/RGD/2012 dated 18.11.2014, CD/44/RGD/2012 dated 18.11.2014 & Order-in-Appeal No.CD/ 160/RGD/2015 dated 16.2.2015 dismissed the appeal filed by them by blindly following the above referred Order-in-Appeal dated 25. 10.2012.
- There is no dispute in the present case as regards non-admissibility of rebate of excise paid on sea freight & sea insurance. They have already accepted that they are not eligible for rebate of excise duty paid on sea freight & sea insurance.
- The present case is regarding quantification of rebate of excise duty pertaining to sea freight & sea insurance. According to them, the rebate of excise paid on sea freight & sea insurance is Rs.33,10,877/-. Whereas, as per department, the difference between provisional FOB value and final FOB value represents sea freight & sea insurance.

The department has wrongly & perversely assumed that the difference between provisional FOB value & final FOB value is towards sea



freight & sea insurance Whereas, the difference between provisional FOB value and final FOB value represents nothing but sale price of goods which varied due to finalization of LME price.

- In other words; the amount of rebate disputed by the department as being wrongly sanctioned does not represent excise duty on sea freight & sea insurance. The amount of rebate disputed by department represents duty on difference between provisional FOB value and final FOB value. This difference represents nothing but sale price of goods which varied due to finalization of LME price.
- As submitted supra, they cleared the goods for export on provisional basis since the price of the exported goods is based on LME price. Therefore, the price and duty paid at the time of export is based on prevailing LME price. The sale price of the export goods is determined finally in the due course when the final LME price is available.
- Thereafter, the provisional assessment is finalized by the Assistant Commissioner. The finalization of provisional assessment is done every month and duty payment certificate based on the final assessment is sent directly by the Jurisdictional Range Superintendent to the Deputy Commissioner (Rebate), Raigad for sanctioning the rebate claim. The Petitioners have adduced the provisional Shipping Bill which was later finalized at the end of the applicant.
- The difference in amount of provisional assessment and final assessment is due to fluctuation in LME prices which is approved by the Jurisdictional Deputy Commissioner. The contention of the Revenue that the difference in the FOB value is on account of freight and insurance charges is baseless and without any substance. As submitted in the facts supra, the Deputy Commissioner had already disallowed rebate of the excise duty paid on sea freight and sea insurance while passing rebate sanctioning Orders-in-Original which was affirmed by the Commissioner (Appeals), Mumbai. Accordingly, the Petitioners was allowed to take the Cenvat credit of Rs. 33,10,877/- (Rupees Thirty Three Lakh Ten Thousand Eight, Hundred



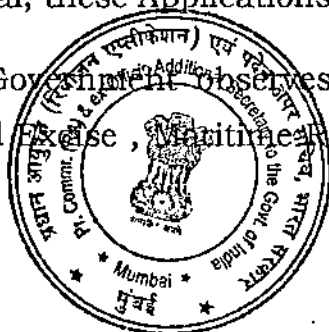
Seventy Seven) paid on the freight & insurance, as allowed by The Commissioner of Central Excise (Appeals-II) -Mumbai.

- The Deputy Commissioner has rightly allowed the rebate claim on FOB value finally assessed. It cannot be the case of the department that excise duty is not payable on value so assessed finally nor it is the case of the department that the value finally assessed is lower than value provisionally assessed. Even if that be the case, the Petitioners are entitled for refund of the same.
- The department has presumed that the entire difference between the provisional FOB value mentioned on Shipping Bill & Final FOB value indicated on Shipping Bill pertains to sea freight & sea insurance. They submit that amount contested by the department is not the duty paid on sea freight & sea insurance but excess duty paid by them on the supplementary invoices.

10 A personal hearing held in these cases was attended by Ms. Anjali Hirawat, Advocate and Shri Santosh Singh, Assistant Manager (Commercial) on behalf of the applicant. They reiterated the submissions filed in these three Revision Applications and written submissions filed on the date of personal hearing. The Advocate also reiterated the Order of Hon'ble Bombay High Court dated 05.03.2018. It was prayed that Order in Appeal be set aside and present applications be disposed off in pursuance to the High Court Order.

11. Government has carefully gone through the relevant case records available in case files, written submissions/additional submissions of the applicant and also perused the impugned Orders-in-Original and Orders-in-Appeal, Government of India Order No.40-47/2016-Cx dated 10.03.2016 and Hon'ble Bombay High Court Order dated 5.03.2018 in writ Petition No. 11403 of 2016 . Since the issue involved in all three Revision Applications is identical, these Applications are decided vide common order.

12. Government observes that the Assistant Commissioner of CGST & Central Excise, Maritime Rebate, Belapur Commissionerate in his 'Affidavit'



in Reply dated 01.03.2018 filed in Writ Petition No. 11403 of 2016 stated as under:-

8. *I say that the order of Revision Authority, Central Govt., is just and proper. As a consequence of the order petitioner was required to pay an amount of Rs.5,07,59,409/- to the department and were eligible to avail credit of an equivalent amount in their books of account. However, as per records available with the department the petitioner has neither paid the amount to the department nor claimed to have done so in the petition. The petitioner, therefore, has not complied with the order of RA. Hence at this stage the Petitioner retains the cash amount of Rs. 5,07,59,409/- in respect of 8 Rebate orders of Deputy Commissioner (Rebate). A summary of calculation of this amount of Rs. 5,07,59,409/- is submitted as Exhibit-II. Therefore there is no action required to be taken for the payment of any amount to the petitioner and prayer of the petitioner seeking directions for the payment of rebate of Rs.5,07,59,409/- needs to be dismissed.*
9. *I further say that Central Goods and Service tax Act (CGST),2017 was brought into force on 01.07.2017. The Act includes transitional provisions. Section 142(3) of the transitional provisions of the said CGST Act 2017 reads as under :-*

Section 142(3) :-Every claim for refund filed by any person before, on or after the appointed day, for refund of any amount of CENVAT credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of section 11B of the Central Excise Act, 1944:

Provided that where any claim for refund of CENVAT credit is fully or partially rejected, the amount so rejected shall lapse:



Provided further that no refund shall be allowed of any amount of CENVAT credit where the balance of the said amount as on the appointed day has been carried forward under this Act.

Therefore as per said Section 142(3) refund of Cenvat Credit after 01.07.2017, is to be paid in cash only.

10. *As mentioned at Para 7 above Revision application filed by Petitioner pertaining to protective demand show cause notices are pending with Revision Authority. If the petitioner succeeds then amount of Rs. 5,07,59,409/- included in eight Rebate orders sanctioned by Deputy Commissioner(Rebate) that is already with the Petitioner gets approval of Revision Authority and no further action will be taken by the department for recovery of said amount. However, if the Petitioner fails then the Petitioner is required to pay Rs. 5,07,59,409/- to the department and claim equivalent amount as credit. But in view of Section 142(3) of CGST Act, 2017, this amount is to be paid in cash. Thus, even if Petitioner fails no action will be taken by the department for recovery of said amount in view of the enactment of transitional provisions under the CGST Act. Hence, there is no gain to either petitioner or the department in the subject proceedings and the writ petition may please be dismissed.*

13. Government also observes that the petitioner (the present applicant) in their "Affidavit in Rejoinder" dated 05.03.2018 filed in Writ Petition No. 11403 of 2016 before Hon'ble Bombay High Court, stated that

9 *Be that as it may, even if amount of Rs.50759409/- is disallowed as rebate claim for the sake of argument, it only means that the petitioners would not be entitled to receive that amount in cash from the Revenue. However, the Petitioners would certainly be entitled to take re-credit of the same in Cenvat account. Now, as per Section 142(3) of the Central Goods and Services Tax Act, 2017, the Revenue is obliged to refund such amount in cash only to the Petitioners. So, looked from this angle also, there is no*

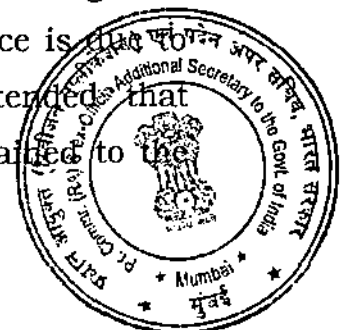


revenue implication for principal amount as well as interest. In view of this subsequent development & in view of the Revenue's admission in para 10 of the Affidavit-in-Reply that no action will be taken against the Petitioners for recovery even if Petitioners fail before the Revisionary Authority, the question-raised in Writ Petition is purely academic in nature & may be disposed off accordingly.

14. The Hon'ble Bombay High Court while disposing of the aforementioned Writ petition vide its order dated 05.03.2018 observed as under :-

3. *Having perused, with the assistance of both Mr. Sridharan and Mr. Bangur, we are indeed satisfied that on account of the subsequent development and particularly the Central Goods and Services Tax Act, the issue in this Petition is purely academic and it is rendered infructuous.*

15. Government observes that in initial Orders-in-Original (at Table shown at para 3 above) an amount of Rs. 33,10,877/- to the extent duty paid on Freight & Insurance was rejected by the Deputy Commissioner. The appeals filed by the applicant against the aforesaid Orders, were dismissed by the Commissioner (Appeals) vide Order-in-Appeal dated 17.4.2012, Order-in-Appeal dated 19.1.2012 & Order-in-Appeal dated 19.6.2012. The Commissioner (Appeals), however, directed the applicant to file separate refund claim for excess duty paid. Accordingly, the applicant filed the refund claim for said amount. On the other hand, issue in the appeal filed by the department was whether rebate is admissible on the provisional FOB value mentioned on Shipping Bill instead of FOB value finalized subsequent to export of the goods. It is the contention of the applicant that the department proceeded on the basis of assumption that entire difference between provisional FOB value & finalized FOB value pertained to freight & insurance only and they failed to understand that the difference is due to difference in LME prices. The applicant has further contended that difference in provisional FOB value and Final FOB Value pertained to the



upward revision in prices of goods exported and that under the guise of denying the rebate of duty paid on freight and insurance portion, the department sought to deny the rebate of duty paid in supplementary invoices in cases of upward revision of price at the time of final assessment.

16. Government further observes that the applicant had raised the similar grounds in their appeals/Revision application before Commissioner (Appeals) as well as Revisionary Authority respectively, however, the ground, as aforementioned, have not been considered/examined either by the Additional Commissioner, Raigad (Original adjudicating authority) or by Commissioner (Appeals) nor there is any finding distinguishing the same in the respective Orders passed by these authorities. Thus, the issue /question remained unanswered and has not been decided.

17. Government observes that the applicant in its Revision Applications have enclosed the illustrative copies of shipping bills provisionally assessed at the time of export, supplementary invoices issued by them, and shipping bills showing the finalized assessment by the Assistant Commissioner of Customs by indicating final assessable value manually and shipping bills finally assessed in support of their contention that the difference between provisional FOB value and final FOB value represents nothing but sale price of goods which varied due to finalization of LME price and not on account of freight & insurance. The sample copies of aforesaid documents reveal that there is force in the contention of the applicant, however, each of such documents needs to be verified by the original authority to determine their authenticity and veracity.

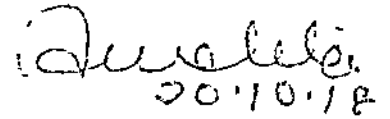
18. In view of the foregoing, Government is of the considered view that the matter is required to be remanded back to the original adjudicating authority for giving specific findings on this issue and passing a speaking order whether the disputed amount of Rs.5,07,59,409/- (Rupees Five Crore Seven Lakh Fifty Nine Thousand Four Hundred and Nine) is available to the applicant as rebate or otherwise.



19. In view of the Affidavit-in-Reply (para 10) dated 01.03.2018 filed by the Department in W. P. No. 11403 of 2016 as well as the Hon'ble Bombay High Court judgment dated 05.03.2018, the entire activity of verifying whether the difference is only on account of increase in FOB value due to change in LME price, may turn out to be a purely academic exercise. However, the show cause cum demand notices issued in the matter are required to be adjudicated after giving due credence to the submissions made by the applicant from the very beginning to set the record straight as well as for purposes of accounting.

20. In view of the foregoing, Government sets aside impugned Orders in Appeal bearing Nos. CD/44/RGD/2014 dated 18.11.2014, CD/42/RGD/2014 dated 18.11.2014, and CD/160/RGD/2015 dated 16.03.2015 and case is remanded back to the original adjudicating authority for fresh adjudication after causing necessary verification as contemplated at para 17 supra. The applicant is also directed to submit all the relevant documents for carrying out verification by the original adjudicating authority. The original adjudicating authority shall decide the impugned cases within 8 weeks from the receipt of this order.

21. All the three Revision Applications are disposed off in terms of above.


20/10/18

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

ORDER No.374-376/2018-CX (WZ) /ASRA/Mumbai Dated 30.10.2018 .

To,

M/s Hindalco Industries Ltd.,
Unit Birla Copper,
P.O. Dahej, Dist: Bharuch
Gujarat-392130



ATTESTED


20/10/18
S.R. HIRULKAR
Assistant Commissioner (R.A.)

Copy to:

1. The Commissioner of GST & CX, Belapur Commissionerate, 1st Floor, CGO Complex, Belapur CBD, Navi Mumbai- 400 614.
2. The Commissioner of GST & CX, (Appeals) Raigad, 5th Floor, CGO Complex, Belapur, Navi Mumbai, Thane.
3. The Deputy / Assistant Commissioner, Division VII, Belapur, GST & CX, Belapur Commissionerate, 1st Floor, CGO Complex, Belapur. CBD, Navi Mumbai- 400 614.
4. Shri V Lakshmikumaran, Attorneys, 104, Kakad Chambers, 132, Dr. Annie Besant Road, Worli, Mumbai 400 018.
5. Sr.P.S. to AS (RA), Mumbai.
6. Guard file
7. Spare Copy.

