

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.195/1464/12-RA

1990

Date of Issue:-

22/11/2018

ORDER NO. 377 /2018-CX (WZ) /ASRA/Mumbai DATED 31.10.2018 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.

Applicant : M/s Accusynth Speciality Chemicals Pvt. Ltd.,
(Formerly M/s Chemagis India Pvt. Ltd.) , Shivam
Chambers, 106/108, 1st floor, S.V. Road, Goregaon
(W), Mumbai- 400 062.

Respondent : Commissioner (Appeals), Mumbai Zone-II.

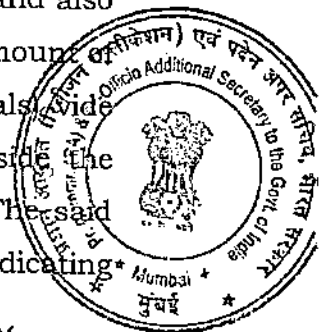
Subject : Revision Applications filed, under section 35EE of the
Central Excise Act, 1944 against the Order-in-Appeal
No. US/472/RGD/2012 dated 06.08.2012 passed by the
Commissioner (Appeals), Mumbai Zone-II.



ORDER

This revision application is filed by M/s Chemagis India Pvt. Ltd., Shivam Chambers (now M/s Accusynth Speciality Chemicals Pvt. Ltd.), 106/108, 1st floor, S.V. Road, Goregaon (W), Mumbai- 400 062 (hereinafter referred to as "the applicant") against the Order-in-Appeal No. US/472/RGD/2012 dated 06.08.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai Zone-II.

2. The applicant are holding Central Excise Registration No. AACCR2244JXM001 for manufacture of excisable goods viz. Mannich Hydrochloride falling under Chapter 29 CET Act, 1985. A rebate claim was sanctioned to the applicant by the Assistant Commissioner (Rebate), Raigad vide Order in Original No. 870/10-11 dated 08.09.2010. The subject order was reviewed by Commissioner, Central Excise, Raigad to the extent of excess rebate of Rs. 26,734/- (Rupees Twenty Six Thousand Seven Hundred Thirty Four Only) on the ground that FOB value shown in the shipping bill was less than the ARE-1 value and the same is arrived at after reducing the freight and insurance charges from commercial invoice value. The commercial value is the value at which the goods are sold whereas the transaction value as per Section 4 of the Central Excise Act is the value at which the goods are sold but does not include freight and insurance. Therefore, the value after deducting freight and insurance from commercial invoice value (which is equal to FOB value) should be the transaction value for the purpose of Section 4 of the Central Excise Act. Accordingly, an appeal was filed by the department before Commissioner (Appeals) and also protective demand cum show cause notice was issued demanding amount of Rs. 26,734/- with interest and penalty. The Commissioner (Appeals) vide order in appeal No. US/348/RGD/2011 dated 17.10.2011 set aside the impugned order in original and allowed the department's appeal. The said protective demand of Rs. 26,734/- was confirmed by the adjudicating



authority vide order in original No. Raigad/ADC/183/11-12 dated 08.02.2012.

3. Aggrieved by the said order in original, the applicant preferred an appeal. The appellate authority vide order in appeal No. US/472/RGD/2012 dated 06.08.2012 upheld the order in original and rejected the appeal.

4. The instant revision application has been filed by the applicant against the said order in appeal No. US/472/RGD/2012 dated 06.08.2012 passed by the Commissioner (Appeals), Mumbai Zone-II.

5. The applicant has filed instant revision application on the grounds that:

- 5.1 the factory is not the place of removal whether the export is taking place under FOB/CNF/CIF contract. The fallacy between the place of removal as factory gate & the FOB value as transaction value is apparent & cannot be allowed to go through for wrong determination of transaction value.
- 5.2 the explanation 2 in the Rule 5 specifically acknowledges that the cost of transportation from the factory to the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods.
- 5.3 the international buyer places order on FOB/CNF/CIF basis, the price stated in the contract is a composite representing the whole value of the goods.
- 5.4 if freight is not shown separately in invoice then how can the freight be deducted; it is wrongly presumed that freight & insurance is the cause for difference in ARE-1 value and FOB value.
- 5.5 the rebate sanctioning authority cannot defy the CBEC circular till the same is not modified / rescinded.

The applicant, therefore, prayed :

- a) to validate rebate on the transaction value (which includes freight & insurance) in terms of Section 4(3)(d) of the Central Excise Act, 1944 & set aside the appeal file by the department.



b) Any other consequential relief may please be allowed as per the law.

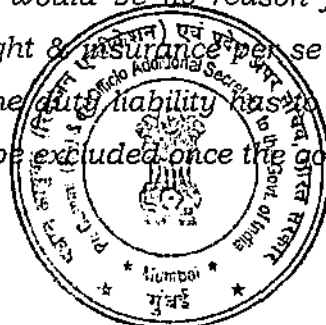
6. A Personal hearing was held in the case and Shri Rajiv Gupta, Consultant, appeared for hearing on behalf of the applicant and reiterated the submission filed through Revision Application and written submissions along with the case laws filed on the day of hearing. In view of same, it was requested that the Order-in-Appeal be set aside.

7. 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.

8. Government observes that the applicant at para 7 of additional submissions filed on the date of personal hearing has contended as under :-

"The issue is already settled by the Apex Court. (in the case of Commissioner of Customs & Central Excise, Aurangabad Vs M/s Roofit Industries Ltd). The Supreme court has said that freight & insurance is subject to duty as transaction value under Section 4 of the C. Ex. Act, once the sale gets conducted i.e. at that point of time the ownership of the goods is transferred from the seller to the buyer. Please specifically refer to the paragraph 13 of the order in particular.

Here, in this case, the same gets completed once the goods are received & accepted by the buyer at Ashdod, Israel thus leaving no doubt for any other interpretation; please see the order issued by the buyer & the certificate placed on record by us. Please see Exhibit 6; the subject certificate very clearly states that the delivery stands completed once the goods are delivered in sound condition at the named destination port & accepted by the buyer in terms of the specification. It is further pertinent to point out that there would be no reason for the case to reach the apex court in case freight & insurance per se are not part of the transaction value on which the duty liability has to be discharged. The freight & insurance can only be excluded once the goods are sold ex



works & the delivery accepted by the buyer or agent at that point of time. The Customs broker/transporter who undertakes shipment is not the agent or representative of the foreign buyer. Therefore as per the issue having been settled by the Apex the place of delivery cannot be the Factory Gate/Port of shipment/On Board the vessel because sale does not stand completed at any of these places. Therefore, the place of sale being Ashdod Israel in this case, the freight & insurance up to the place of delivery/ sale is part of the transaction value on which the duty payment has to be made in terms of the law & there are no two ways about it. Lastly, there is no challenge to the facts & contents of the certificate regarding transfer of the title of goods being completed once the buyer received the goods in sound condition & accepts it. Once, this fact is incontrovertible then as per the apex court decision, the freight & insurance are part of the transaction value on which duty liability is correctly discharged”.

From the above, Government observes that the applicant in the present application has sought to claim freight and insurance charges incurred beyond the port of export as a part of the transaction value and duty paid on such value is sought to be rebated to them in cash.

9. Government observes that the relevant statutory provisions for determination of value of excisable goods are extracted below:

- *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, the value determined in such manner as may be prescribed.



- 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."

- 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.

- 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."

10. 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.

11. Government observes that the applicant has relied on the Hon'ble Supreme Court Order in Civil Appeal No. 5541 of 2004, decided on 23-4-2015 in the case of Roofit Industries Ltd. [2015 (319) E.L.T. 221 (S.C.)] wherein the question of determination of 'place of removal' for the purpose of Central Excise Act, 1944 was considered by the Supreme Court. In this case, the Supreme Court was considering the issue as to whether the goods were sold at the factory gate or at the premises of the buyer where the seller had arranged for transportation and insurance of the goods during transit. The Supreme Court, vide order dated 23.04.2015 set aside the order of CESTAT and confirmed inclusion of freight, insurance and unloading charges in the assessable value for excise duty under Section 4 of the Central Excise Act, 1944, thus holding the buyers' premise to be 'the point of sale'.

At para 11 & 12 of the said Order the Hon'ble Supreme Court has observed as under :

11. In Commissioner of Central Excise, Noida v. Accurate Meters Ltd. - (2009) 6 SCC 52 = 2009 (235) E.L.T. 581 (S.C.), the Court took note of few decisions including in the case of Escorts JCB Ltd. and reiterated the aforesaid principles by emphasizing that the place of removal depends on the facts of each case.

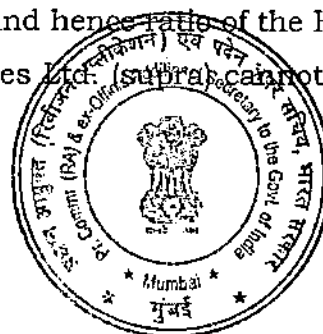
12. The principle of law, thus, is crystal clear. It is to be seen as to whether as to at what point of time sale is effected namely whether it is on factory gate or at a later point of time, i.e., when the delivery of the goods is effected to the buyer at his premises. This aspect is to be seen in the light of provisions of the Sale of Goods Act by applying the same to the facts of each case to determine as to when the ownership in the goods is transferred from the seller to the buyer. The charges which are to be added have put up to the stage of the transfer of that ownership inasmuch as once the ownership in goods stands transferred to the



buyer, any expenditure incurred thereafter has to be on buyer's account and cannot be a component which would be included while ascertaining the valuation of the goods manufactured by the buyer. That is the plain meaning which has to be assigned to Section 4 read with Valuation Rules.

12. Government further notes that CBEC vide Circular No. 988/12/2014-CX dated 20.10.2014 has clarified that the place of removal needs to be ascertained in terms of provisions of Central Excise Act, 1944 read with provisions of the Sale of Goods Act, 1930. Payment of Transport, inclusion of transport charges in value, payment of insurance or who bears the risk are not the relevant considerations to ascertain the place of removal. The place where the sale has taken place or when the property of goods passes from the seller to the buyer is the relevant consideration to determine the place of removal.

13. Government observes that in the case of Commissioner of Central Excise, Aurangabad v. Roofit Industries Ltd. (referred to at para 11 above), the fact was that the assessee has received a work order from various Government authorities and private contractors and the agreements entered into by the assessee with the above mentioned parties were for designing, manufacturing, providing at site, laying, jointing and testing of PSC pipes of specified sizes. The agreement required the assessee, for delivery of the finished goods not at the factory gate, but the premises of the buyer. The Apex Court held after going through the terms and conditions of the contract, it is clear that the goods have to be delivered at the place of buyer and it was only at that place where the acceptance of supplies was to be effected and as such price or transaction value are inclusive of cost of material, Central Excise duty, loading, transportation, transit risk and unloading charges. However, in the instant case the applicant is claiming the freight & insurance i.e. outward handling charges incurred beyond the place of removal i.e. port of export and hence ratio of the Hon'ble Apex Court Order in the case of Roofit Industries Ltd. (supra) cannot be made squarely applicable to the present case.



14. Government further observes that the Ministry has clarified vide its Circular No. 999/6/ 2015-CX, dated 28-2-2015 what is the "place of removal" for taking CENVAT credit of services used for export of goods for two types of exports, one for direct export and another for deemed export. Place of removal for direct export is mentioned in para 6 as under;

6. *"In the case of clearance of goods for export by manufacturer exporter, shipping bill is filed by the manufacturer exporter and goods are handed over to the shipping line. After Let Export Order is issued, it is the responsibility of the shipping line to ship the goods to the foreign buyer with the exporter having no control over the goods. In such a situation, transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer Exporter and **place of removal would be this Port/ICD/CFS.** Needless to say, eligibility to CENVAT Credit shall be determined accordingly."*

Whereas for deemed export it is mentioned in para 7 as under;

7. *In the case of export through merchant exporters, however, two transactions are involved. First is the transaction between the manufacturer and the merchant exporter. The second transaction is that between the merchant exporter and the foreign buyer. As far as Central Excise provisions are concerned, the place of removal shall be the place where the property in the goods passes from the manufacturer to the merchant exporter. As explained in paragraph 4 supra, in most of the cases, this place would be the factory gate since it is here that the goods are unconditionally appropriated to the contract in cases where the goods are sealed in the factory, either by the Central Excise officer or by way of self-sealing with the manufacturer of export goods taking the responsibility of sealing and certification, in terms of Notification No. 19/2004-Central Excise(N.T.) dated 6.9.2004, etc.*

8. *However, in isolated cases it may extend further also depending upon the facts of the case **but in no case, this place can be beyond***



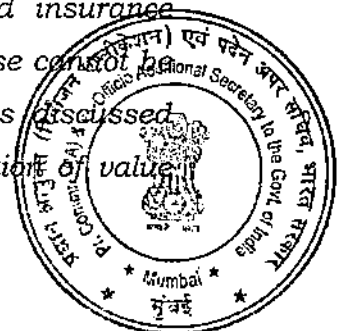
the Port / ICD / CFS where shipping bill is filed by the merchant exporter. The eligibility to CENVAT Credit shall be determined accordingly.

15. Moreover, Government observes that GOI in its Orders No. 411-430/13-Cx dated 28.05.2013 In Re: M/s GPT Infra Projects Ltd. and Order No. 97/ 2014-Cx dated 26.03.2014 In re : Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] has categorically held that

"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. It can either be factory, warehouse or port/Customs Land Station of export and expenses of freight / insurance etc. incurred upto place of removal form part of assessable value. Under such circumstances, the place of removal is the port/place of export since sale takes place at the port /place of export.

At para 9 of its Order dated 26.03.2014 in Re: Sumitomo Chemicals India Pvt. Ltd. [2014(308) E.L.T.198(G.O.I.)] 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".

16. In view of the facts and discussion herein above, Government observes that in the instant case the applicant, being a manufacturer exporter, transfer of property can be said to have taken place at the port where the shipping bill is filed by them and place of removal would be the Port/ICD/CFS and transaction value is required to be arrived at accordingly, but in no case, this place can be beyond the port of export. Accordingly, Government holds that freight and insurance for transport of goods and other charges incurred beyond port of export cannot be part of the transaction value.

17. In view of the above, Government finds no legal infirmity in the impugned Order-in-Appeal and hence upholds the same.

18. The revision application is, therefore, rejected being devoid of merit.

19. So, ordered.


31.10.18
(ASHOK KUMAR MEHTA)

Principal Commissioner (RA) & Ex-Officio
Additional Secretary to the Government of India

M/s Chemagis India Pvt. Ltd., Shivam Chambers
(now M/s Accusynth Speciality Chemicals Pvt. Ltd.),
106/108, 1st floor, S.V. Road, Goregaon (W),
Mumbai- 400 062

ORDER NO. 377/2018-CX (WZ)/ASRA/MUMBAI

DATED 31.10.2018.

ATTESTED


22-11-18
S.R. HIRULKAR
Assistant Commissioner (R.A.)



F.No.195/1464/12-RA

Copy to:

1. The Commissioner of CGST & Central Excise, Raigad, Plot No. 1, Sector-17, Khandeshwar, Navi Mumbai - 410 206.
2. The Commissioner of Central Excise, (Appeals), Raigad, 5th floor, C.G.O. Complex, C.B.D. Belapur, Navi Mumbai - 400 614.
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