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GOVERNMENT OF INDIA
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DEPARTMENT OF REVENUE

Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuff Parade,
Mumbai- 400 005

F. NO. 371/61-64/DBK/15-RA 1496 Date of Issue: 10.02.2022

39-42

ORDER NO. /2022-CUS (WZ) /ASRA/Mumbai DATED 08 .02.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF THE CUSTOMS ACT, 1962.

Applicant	:	M/s Schott Glass India Pvt. Ltd. Village-Ankhi, Tal-Jambusar, Dist-Bharuch-392150.
Respondent	:	Commissioner of Customs (Appeals), Mumbai-III
Subject	:	Revision Applications filed, under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No.MUM-CUSTM-AXP-APP-159-162/15-16 dated 02-07-2015 passed by the Commissioner of Customs (Appeals), Mumbai-III

ORDER

This revision application is filed by the M/s Schott Glass India Pvt. Ltd. situated at Village-Ankhi, Tal-Jambusar, Dist-Bharuch-392150 (hereinafter referred to as "the applicant") against the Order-in-Appeal No. MUM-CUSTM-AXP-APP-159 to 162/15-16 dated 02.07.2015 passed by the Commissioner of Customs (Appeals), Mumbai-III.

2. Brief facts of the case are that the applicant had imported capital goods on payment of Customs duties. They had availed Cenvat credit on the CVD, Education Cess, S&H Education Cess and Special Additional duty paid at the time of import. The applicant had installed the capital goods in their factory premises and utilized the same for the manufacturing process of the finished goods. After utilization of the said capital goods for some period, the applicant had exported the capital goods on payment of duty and thereafter filed six drawback claims for the various periods under Section 74 of Customs Act, 1962. The applicant claimed Drawback only on the Basic Customs Duty. The Deputy Commissioner while sanctioning the drawback claim took the full amount of duty paid at the time of import for calculating the drawback amount and deducted the Central Excise Duty Rebate claimed and sanctioned the remaining amount vide the following Order in Originals viz. (i) DC/RNV/1726/11/ADJ/ACC dated 20-06-2012; (ii) DC/RNV/1727/11/ADJ/ACC dated 20-06-2012; (iii) DC/RNV/1712/11/ADJ/ACC dated 19-06-2102 and (iv) DC/3308/11/ADJ/ACC dated 08-11-2012

3.1 Being aggrieved by the aforesaid Order-in-Originals, the applicant filed four appeals before the Commissioner of Customs (Appeals), Mumbai-III on the grounds that the applicant had claimed the drawback exclusively on the amount of Basic Customs Duty and that the drawback sanctioning authority should not have considered the entire amount of Customs duty including CVD on which cenvat credit was availed as the appellants had not claimed drawback on the amount of CVD and therefore the sanctioning authority has applied incorrect formula for arriving at the amount of Drawback claim. Commissioner Appeal upheld the D.C' s Order-in-Originals and dismissed the applicant's appeal.

3.2 The Appellate Authority observed that under section 74 of the Customs Act, 1962, there is no mention of any bifurcation of duty or specific provision to consider only the BCD paid on import, as contended by the appellants, anywhere in the provision and the contention that formula is incorrect is baseless as the department has followed the procedure laid down in terms of section 74 of the Customs Act, 1962 and Notification 23/2008 prescribing the conditions for determining the amount of drawback under section 74.

4. Being aggrieved and dissatisfied with the impugned order in appeal, the applicant has filed this Revision Application on the following grounds that:

4.01 The Order dated 02-07-2015 is not only improper, invalid and unjustified but is also not based on any of the legal grounds of the law.

4.02. The applicant submitted that in the instant case, they imported the Capital goods to use in or in relation to manufacture of the finished goods. They utilized the said capital goods for some time and thereafter they re-exported the same without payment of duty under Letter of Undertaking in terms of the provisions of Rule 19 of the Central Excise Rules, 2002. After re-export of the finished goods and getting the required documents as proof of export such as Shipping Bill etc., the applicant had filed Drawback claim of Customs duty excluding the CVD portion on which Cenvat Credit was availed on receipt of the capital goods in the factory premises when it was originally imported. Since the Cenvat credit was availed on CVD and Ed. Cess and S & H Ed. Cess paid on CVD, the applicant had filed claim exclusively on Basic Customs Duty. But while calculating the amount of drawback, the drawback sanctioning authority deducted the amount of CVD from the amount of drawback claimed.

4.03. The action of the department in reducing the drawback amount is arbitrary and also not inconformity with the language of Section 74 and Notification No. 23/2008 Cus. For ease of reference, the applicant reproduced Section 74 of the Finance Act, 1994.

4.04. In the instant case, the applicant submitted that it is an admitted fact that the identity of the goods exported was established and declared FOB and PMV of the goods was found to be fair by the Customs department. Instead of sanctioning of the claims in full, the Assistant Commissioner of Customs has surprisingly adopted method which is not legal and logical, and reduced the Drawback claim. For the calculation of DBK amount, he took entire amount of Customs duties paid at the time of import of the such capital goods and then calculated 75% of the amount of Customs duties and then he deducted the amount of cenvat credit availed at the time of export of such capital goods and thereby the reduced the amount of DBK claims. In this context, the applicant submitted that the Assistant Commissioner has adopted novel method to deal with the Drawback claims where the cenvat credit has been availed by the importer in as much as when the applicant has claimed the Drawback claims exclusively on the amount of basic customs duty, it was not required for him to consider the entire amount of Customs duties including CVD. As a matter of fact, while sanctioning of Drawback claim, it was not required for him to consider the amount of CVD on which cenvat credit was availed as the applicant did not claim drawback on the amount of CVD on which cenvat credit was availed. Since the cenvat credit was availed on the amount of CVD, the applicant did not claim DBK on such amount and therefore such amount becomes irrelevant/immaterial while claiming or calculating the amount of DBK particularly when the drawback claim has not been filed in relation to such amount. It was further submitted that the Assistant Commissioner calculated 85% of the entire amount of Customs duties including CVD on which credit was availed (though on CVD, DBK claim was not filed) and then he deducted the amount of cenvat credit availed. The applicant therefore submitted that the Assistant Commissioner has erred in adopting the incorrect and improper formula/method for arriving at the amount of Drawback claim.

4.05. Further, on perusal of the wordings of Section 74 of the Customs Act, 1962, it would be found that any amount of duty paid at the time of importation is required to be paid back as draw back calculating particular percentage as prescribed under the Notification. In terms of the provisions of

Section 74 of the Act, the applicant was entitled for 85% of the Basic Customs Duty as Drawback. But, the Assistant Commissioner had applied incorrect formula and reduced substantial amount of claims. The applicant submitted that they adopted correct formula for claiming Draw back in terms of the Notification No. 23/2008Cus. Since the applicant had availed cenvat credit, it was not legal for them to consider the amount of cenvat credit and hence they did not consider the same and filed claims only on the Basic Customs duty and Cesses paid thereon.

4.06. The applicant submitted that the calculation of the drawback sanctioning authority is not legal and correct in as much as it is not inconsonance with the wordings mentioned in the column (3) of the Table as referred in the Notification No. 23/2008 Cus., dated 01.03.2008. The wordings employed in the said Notification are "percentage of import duty to be paid as drawback". On carefully reading of the said wordings, it is very clear that percentage is required to be calculated on the import duty which is to be paid as drawback. Thus, where the drawback has been claimed only on the Basic Customs Duty then the amount of Basic Customs Duty is only required to be paid as Drawback and thereby percentage of Basic Customs Duty (which has been paid as drawback) is required to be calculated. In the instant case, as stated above, the applicant had only availed drawback of Basic Customs Duty and hence in terms of the wordings of column (3) table of the said Notification, it was required for the drawback sanctioning authority to calculate the drawback amount keeping in mind the amount of Basic Customs Duty and not considering the entire amount of Customs duty paid at the time import. It was thus submitted that the methodology adopted by the adjudicating authority is absurd and is figment of his imagination.

4.07. As regard the consideration of 75% instead of 85% of the amount of customs duty, the applicant submitted that the Assistant Commissioner has erred in considering 75% while arriving at DBK claim in as much as the relevant documents including Shipping Bill were filed within six months.

4.08. The applicant submitted that the contentions of the appellate authority are not correct and legal and hence not sustainable. It has been contended in the impugned OIA that on plain reading of the provisions of Section 74 entire duty on importation be considered determination drawback Section 74 the Customs Act, 1962; there is no mention of any bifurcation of specific provision to consider only the BCD paid on import. In this context, the applicant submitted that in terms of provisions of Section 74 of the Customs Act, 1962, which provide the word "any duty" has been paid on importation. This means if the drawback claim has been filed only in respect of Basic Customs Duty then DBK amount is required to calculated considering percentage of such duty. If the drawback claim has not been filed at all on the entire customs duty, the question of collection of amount of drawback claim on the entire customs duty does not arise at all. Further, in case of UOI Vs. Cus. and C. Ex. Settlement Commission, Mumbai reported in 2010 (258) ELT 476, the Honorable High Court of Mumbai has specifically held that the drawback is nothing but a claim for refund of duty. Thus, if on re-exports, the refund of only customs duty has been claimed then the calculation of drawback claim amount is required to be calculated only on the duty for which refund claim has been filed.

4.09. Further, the appellate authority has also erred in referring the wordings "entire duty" in as much as Section 74 refers the wordings "any duty". As stated above, any duty means the duty for which drawback/refund claim has been filed. The reference of the word "any duty" is required to be considered along with the element of duty for which the drawback claim has been filed. It was also further submitted that though there is no mention of any bifurcation of duty or specific provisions to consider only the BCD paid on import, the calculation of drawback claim is only required to be made only on the amount of drawback claim filed. Thus, the contentions of the appellate authority are not legal and correct.

4.10. It has also been contended that the drawback sanctioning authority has not properly adhered of the provisions in terms of the Notification No. 23/2008-Cus., dated 01.03.2008, prescribing the percentage of import duty

to be paid as drawback with regard to length of period between the day of clearance for human consumption and the day the goods are placed under Customs Control for export. In any view of the matter, the methodology adopted by the drawback sanctioning authority and later on approved by the appellate authority is not sustainable. The methodology/formula adopted in the present case to quantify the amount of drawback belies common sense and logic and on this count, impugned OIA is required to be set aside. The applicant also submitted that the present case is required to be understood in terms of the aforesaid wordings Notification No. 23/2008 but unfortunately both the lower authorities have misread/misinterpreted the said Notification. Thus the contentions of the appellate authority as raised in the impugned order are denied.

4.11 In view of the above, the contentions of the appellate authority are not legal and correct and hence not sustainable. Therefore the applicant submitted that the order, under appeal, passed by the Commissioner (A) deserves to be set aside.

5. A Personal hearing in the matter was granted on 14-10-2021. Shri Vijay Kansara, Advocate appeared online for the hearing on behalf of the applicant and reiterated the submissions already made. He submitted that he claimed drawback of only Customs duty whereas original authority took entire duty for calculation. He submitted that Percentage of drawback should be 85% as Shipping Bill was filed with the Customs within stipulated period.

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

7. It is observed that the main contention of the applicant is that the sanctioning authority has applied wrong percentage and incorrect formula for arriving at the amount of drawback claim. The Orders in Original and the Orders in Appeal contented that the department has processed the drawback claim as per the provisions of Section 74(2) instead of Section 74(1) of the Customs Act, 1962.

8. In view of the above, it is pertinent to discuss the provisions of Section 74 of the Customs Act, 1962, which is as under:-

> *" **SECTION 74. Drawback allowable on re-export of duty-paid goods.** - (1) When any goods capable of being easily identified which have been imported into India and upon which [1][any duty has been paid on importation, -*
>
> *(i) are entered for export and the proper officer makes an order permitting clearance and loading of the goods for exportation under section 51; or*
>
> *(ii) are to be exported as baggage and the owner of such baggage, for the purpose of clearing it, makes a declaration of its contents to the proper officer under section 77 (which declaration shall be deemed to be an entry for export for the purposes of this section) and such officer makes an order permitting clearance of the goods for exportation; or*
>
> *(iii) are entered for export by post under section 82 and the proper officer makes an order permitting clearance of the goods for exportation,*
>
> *ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback, if -]*
>
> *(a) the goods are identified to the satisfaction of the [2][Assistant Commissioner of Customs or Deputy Commissioner of Customs] as the goods which were imported; and*
>
> *(b) the goods are entered for export within two years from the date of payment of duty on the importation thereof :*
>
> *Provided that in any particular case the aforesaid period of two years may, on sufficient cause being shown, be extended by the Board by such further period as it may deem fit.*
>
> *(2) Notwithstanding anything contained in sub-section (1), the rate of drawback in the case of goods which have been **used** after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may, by notification in the Official Gazette, fix.*
>
> *[(3) The Central Government may make rules for the purpose of carrying out the provisions of this section and, in particular, such rules may –*
>
> *(a) provide for the manner in which the identity of goods imported in different consignments which are ordinarily stored together in bulk, may be established;*
>
> *(b) specify the goods which shall be deemed to be not capable of being easily identified; and*

(c) provide for the manner and the time within which a claim for payment of drawback is to be filed.]

(4) For the purposes of this section –

(a) goods shall be deemed to have been entered for export on the date with reference to which the rate of duty is calculated under section 16;

(b) in the case of goods assessed to duty provisionally under section 18, the date of payment of the provisional duty shall be deemed to be the date of payment of duty."

9. On perusal of the provisions under Section 74 of the Finance Act, the conditions required to be satisfied are (i) The imported goods should be capable of being easily identified; (ii) Duty of Customs should be paid on the imported goods and the same should be exported within two years from the date of payment of duty on imported goods; (iii) The exported goods should be identified with the imported goods to the satisfaction of the Assistant/Deputy Commissioner of Customs; and (iv) sub-section (2) of Section 74 stipulates that where the imported goods are used after importation, the amount of drawback will be sanctioned at the reduced rates as fixed by the Central Government having regard to the duration of use, depreciation in value and other relevant circumstances prescribed by the relevant Notification.

The relevant Notification No.23/2008-Customs is as follows.-

In exercise of the powers conferred by sub-section (2) of section 74 of the Customs Act, 1962 (52 of 1962), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 19-Customs, dated the 6th February, 1965,.....

ii) for the TABLE, the following TABLE shall be substituted, namely:- "TABLE S. No. Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export Percentage of import duty to be paid as Drawback

S. No.	***Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export***	***Percentage of import duty to be paid as Drawback***
(1)	*(2)*	*(3)*
1.	*Not more than three months*	*95%*

2.	*More than three months but not more than six months*	*85%*
3.	*More than six months but not more than nine months*	*75%*
4.	*More than nine months but not more than twelve months*	*70%*
5	*More than twelve months but not more than fifteen months*	*65%*
6.	*More than fifteen months but not more than eighteen months*	*60%*
7.	*More than eighteen months*	*Nil*

It can be seen from the Table that in keeping with the objective of sub-section (2) of Section 74 of the Customs Act, 1962, the scheme of the notification is such that it factors in the duration of use by conversely reducing the benefit of drawback available to the exporter.

10.1 Government observes that as per Notification No. 23/2008 the period is to be calculated by considering the length of period between the date of clearance for home consumption and the date when the goods are placed under customs control for export. In the instant case the adjudicating authority has taken the date of finalization of shipping bill/LEO as the endpoint for calculating the length of the period. This method is not according to the stipulations of the impugned Notification.

10.2 The aspect that goes to the root of the matter is the interpretation of the phrase *"Length of period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export"*, it would follow that the place where customs first gains control over the export goods must be identified. It would be relevant to note that the length of period has been stipulated to end "when the goods are placed under Customs control for export". In other words this endpoint for computation of length of period for exported goods is distinctly the beginning of the time period when the goods are placed under Customs control for export and not the point in time when the goods are cleared for export by issue of Let Export Order. In this regard, attention is drawn to sub-rule (1) of Rule 13 of the Customs and Central Excise Drawback Rules, 1995 specifying the manner and time for claiming drawback. This sub-rule sets out that the triplicate copy of the shipping bill for export under claim of drawback is deemed to be a claim for drawback filed on the date when the proper officer of customs makes an order

permitting clearance and loading of goods for exportation under Section 51. On the other hand, in Board Circular No. 13/2010-Cus dated 24.06.2010 which sets out the revised time limits for filing brand rate claim, it has been specified that the claim is to be filed within 3 months from the date of Let Export Order. It is therefore clear that where the Legislature intended to set the bar for time limit as Let Export Order, it has been specified as the date of order permitting export under Section 51 or by specifically mentioning it as the date of Let Export Order. Government is of the considered view that intention of the legislature was that the stipulation of "date when the goods are placed under Customs control" in the Notification No. 23/2008-Cus dated 01.03.2008 has been made to limit the length of period to the exact point in time that the exporter ceases to have control over the goods and the goods come under the control of customs authorities. Therefore, the endpoint for computation of length of period for exported goods in respect of which drawback has been claimed would be the point in time when the goods come under Customs control.

10.3 Government observes that in this case there are distinct milestones in the process for export of goods. The process begins with the filing of shipping bill. It must be borne in mind that the export goods are not required to be produced physically at the time of filing shipping bill. The goods arrive thereafter at the docks and are examined by the port authorities who duly check the quantity of the goods with the shipping bill filed by the exporter. The Dock Appraiser or the Assistant Commissioner then assigns the consignment to a Customs Officer for examination. It is after this point that the goods enter the Customs Area and that is the point of cessation of counting the length of the period.

10.4 In view of the above Government holds that the relevant date under the provision of Section 74 of the Customs Act, 1962 is the date when the goods are placed under Customs control for export i.e. the date when the goods have entered the customs area and are under Customs control for export and not the point in time when the goods are cleared for export by issue of Let Export Order. The original adjudicating authority is required to verify the dates

accordingly and to sanction the remaining of import duty as drawback to the exporter.

11.1 The second contention of the applicant is that the department has adopted incorrect formula for arriving at the drawback rate. The applicant's contention is that they are claiming drawback only on the basic customs duty paid at the time of import and not on any other duty and hence there is no question of deduction of Cenvat credit availed or rebate claimed on Central excise duty from the drawback claimed. The dispute is regarding the manner in which the Drawback is to be calculated. The applicant has claimed the drawback exclusively only on the Basic customs duty since they had already availed Cenvat credit on CVD whereas the department while calculating the drawback amount considered the relevant percentage on the total import duty paid and then deducted the Cenvat credit availed on the CVD and sanctioned the remaining amount.

11.2 Government observes that Section 74 clearly states that goods capable of being easily identified which have been imported into India and upon which any duty has been paid on importation, ninety-eight per cent of such duty shall, except as otherwise hereinafter provided, be re-paid as drawback. However, the rate of drawback in the case of goods which have been used after the importation thereof shall be such as the Central Government, having regard to the duration of use, depreciation in value and other relevant circumstances, may fix, by notification in the Official Gazette. Law clearly stipulate 'any duty' paid is to be taken into account while calculating the drawback amount. The Notification allows the benefit of drawback on the import duties paid on importation. However, there can be no case for the applicant being entitled to double benefit by availing Cenvat availed on the imported goods and rebate of duty on the re-exported goods and simultaneously being paid drawback without taking into account the benefit of Cenvat availed. It would therefore follow that where the applicant exporter has availed Cenvat credit, such credit was required to be reversed while clearing the goods for re-export. Drawback amount has correctly been calculated taking CVD (Cenvat credit amount) into account. Since Cenvat credit was not reversed, therefore original authority has correctly reduced the

payable amount, by this Cenvat credit amount. Drawback payable to the applicant exporter has been appropriately reduced to offset the benefit (of Cenvat credit) already availed by the applicant. Applicant, otherwise, could not have continued to avail Cenvat credit on goods which are no longer being used and have since been re-exported

12. In the light of the discussion made above, the impugned order of the Commissioner (Appeals) is set aside and the matter is sent back to the original adjudicating authority for determining the length of the period between the date of clearance for home consumption and the date when the goods are placed under Customs control for export, the applicable percentage of Drawback and the drawback amount afresh in the light of what has been discussed above.

13. The revision application is dismissed off on the above terms.

Shrawan 8/2/22

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

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ORDER No. /2022-CUS(WZ) /ASRA/Mumbai DATED 08.02.2022

To,

1. M/s Schott Glass India Pvt. Ltd., Village-Ankhi, Tal-Jambusar, Dist-Bharuch-392150
2. Shri Vijay Kansara, Advocate, D/F, 31&32 Sardar Patel, Complex Nr SBI GIDC, Ankleshwar-393002

Copy To:

1. The Principal Commissioner of Customs, Air Cargo Complex Sahar, Andheri (East), Mumbai-400099.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Spare Copy.
5. Notice Board