REGISTERED
SPEED POST

F.No. 195/709-728/11-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

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

Date of Issue 29/5/13

Order No. 411-430/13-cx dated 28-05-2013 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 35 EE of the Central Excise Act, 1944.

Subject	:	Revision Application filed, under section 35 EE of the Central Excise, 1944 against the Orders-in-Appeal No. 21-40/KOL-II/2012 Dated 01-03-2013 passed by Commissioner of Customs and Central Excise, (Appeals),Kolkata.
Applicant	:	M/s GPT Infra Project Ltd., Kolkata.
Respondent	:	Maritime Commissioner of Customs & Central Excise, Kolkata.

****

ORDER

These revision applications are filed by M/s GPT Infra Project Ltd., Kolkata against the Orders-in-Appeal No. 21-40/KOL-II/2012 Dated 01-03-2013 passed by Commissioner of Customs & Central Excise, (Appeals), Kolkata with respect to Orders-in Original passed by the Maritime Commissioner of Central Excise, Kolkata-III, Commissionerate.

2. Brief facts of the case are that the applicants are engaged in manufacture of the prestressed concrete sleepers for railway and exported the same goods to Bangladesh under claim of rebate of duty under rule 18 of the Central Excise rules, 2002. The goods were exported through petrapole land Customs Station to Benapole i.e. Land Customs station of Bangladesh. They paid the excise duty on the price CFR Benapole basis. The original authority vide impugned Orders-in-Appeal sanctioned the rebate claim.

3. Being aggrieved by the said Orders-in-Original, department filed appeals before Commissioner (Appeals) on following grounds:

i) In case excisable goods are not sold at the place of removal but are sold for delivery at a place other than place of removal, then cost of transportation form place of removal to place of delivery is to be deducted from the transaction value to compute assessable value under section 4 of the central Excise Act, 1944 read with rule 5 of Central Excise valuation (Determination ofp rice of excisable godos) Rules, 2000.

ii) For export clearance, place of removal is port of export as held in the following case laws:

A) Kuntal Granites Ltd. Vs CCE, Bangalore [2007 (215) ELT 515 (Tri. Bang.)

B) CCE, Rajkot Vs. Rolex Rings P. Ltd. [2008 (230) ELT 569 (Tri. Bang.)

C) CCE, Rajkot Vs. Adani Pharmachem O. Ltd. [2008 (232) ELT 804 (Tri. Ahmd.)

Accordingly, in terms of rule 5 of the valuation rules, the cost of transportation form place of removal that is from port of export to place of delivery that is port of discharge needs to be deducted from the transaction

value to arrive at section 4 value. In other words, the cost of transportation beyond place of removal is not part of asessable value and accordingly FOB value is the assessable value in case of export of goods.

iii) As per rule 18 of the central Excise Rules, 2002, rebate can be granted only to the extent of duty paid on export goods. Therefore, any amount which is paid in excess of duty actually payable does not partake the character of duty and remains an amount in the manner of extra deposit with the Government in other words, the amount deposited in excess of duty payable does not assume character of duty and hence cannot be granted rebate of under rule 18 of Central Excise Rules, 2002.

iv) GOI in case of Shri Bhagirth Textiles Ltd., [2006 (202) ELT 147 (GOI)] has held that in case an exporter has paid duty on CIF value, duty paid on transaction value of goods is only required to be refunded in cash and excess payment duty paid on difference between CIF and FOB value is allowed to be refunded in cenvat credit. Punjab and Haryana High Court in case of Nahar Industrial Enterprises Ltd. Vs. Union of India [2009 (235) ELT 22 (P&H)] has also held the cash refund of Excise duty paid is to be allowed only to the extent of duty actually payable and remaining refund should be granted by way of credit that is the manner in which excess amount was paid. Commissioner (Appeals) decided the cases in favour of department.

4. After considering all the submissions, Commissioner (Appeals) accepted the department's revision application and ordered for recovers of excess paid amount.

5. Being aggrieved by the impugned Orders-in-Appeal, the applicant has filed these revision applications under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

5.1 In the present case, the goods were exported through petrapole Land Customs Station. Under the contract with the buyer, the price of the goods was fixed

CFR Benapole i.e, the Land Customs station on the Bangladesh side of the India-Bangladesh border. The applicant submits that the said CFR price was the transaction value in the instant case. The applicant was responsible for delivery of the goods at Benapole. The duty was paid by the applicant on the said CFR Benapole price. The jurisdictional Central Excise authorities accepted the said CFR price as the transaction value and have not raised any objection. The Commissioner (Appeals) has himself accepted that the transaction value is the value at the port of export/LCS. Therefore, the transportation charges upto the Land Customs station at Petrapole were part of the transaction value. As stated above, Benapole is the Land Customs Station on the Bangladesh side of the India-Bangladesh border across petrapole. The excise duty was thus rightly paid by the respondent on CFR Benapole price and there was no excess payment of duty.

5.2 The applicant submits that the rebate under Rule 18 has to be granted for the amount actually paid as certified by the jurisdictional superintendent of Central Excise. There is no question of re-quantifying the amount of rebate by the rebate sanctioning authority. As stated above, the jurisdictional Central Excise authorities have accepted the assessment made by the applicant and have not raised any objection. The position in this regard has been clarified by the CBEC vide its circular No. 510/06/2000-CX dt. 03-02-2000. The applicant respectfully submits that the said circular is binding on the departmental authorities. The Commissioner (Appeals) failed to appreciate that the facts and circumstances in the cases of CCE Vs. Ratan Melting & Wire Industries [2008 (231) ELT 22 (SC)] and CCE Vs. Minwool Rock Fibres Ltd. [2012 (278) ELT 581 (SC)] relied upon by him are distinguishable from the facts of the present case. Without prejudice to the aforesaid and in any event the Commissioner (Appeals) should have accepted the alternative claim of the applicant that if it is held that the applicant is liable to be paid the excess rebate of granted to it in cash, then, upon such payment, the applicant should be permitted to take back credit of the said excess amount paid by it in its cenvat credit account.

5.3 In the case of Shri Bhagirth Textiles Ltd. (Supra) the Hon'ble Revisionary Authority permitted the exporter to take back the cenvat credit of the excess central

Excise duty paid by it on CIF value of the export goods. In the case of Nahar Industrial Enterprises Ltd., the Hon'ble Punjab & Haryana High Court held that refund of the excess duty allowed by the Assistant Commissioner by credit to cenvat account was appropriate. In this connection, the applicant also refers to the order of the Revisionary Authority In Re: Balkrishna Industries Ltd. [2011 (271) ELT 148 (GOI)]

5.4 The applicant submits that no amount is liable to be recovered from the applicant. In the circumstances, the question of payment of any interest under section 11AB of the 1944 Act does not arise. The applicant further submits that even other wise, the applicant was entitled to refund of the entire amount paid by it under the respective invoices, either by way of cash refund or by way of credit to its cenvat credit account. Thus, no excess amount was refunded to the applicant and the present dispute is only about the mode of refund.

6. Personal hearing was scheduled in this case on 12-10-2012 and 20-02-2013. Personal hearing held on 20-02-2013 was attended by Shri R.K.Sharma, advocate and R.K.Dash, consultant on behalf of the applicant who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of respondent department.

7. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

8. Government observes that the applicant exported the goods from petrapole Land customs to Bangladesh and filed rebate claims with the original authority, who sanctioned the said claims initially. Subsequently, the department filed appeals against impugned Orders-in-Original mainly on the ground that the applicant ought to have paid duty on FOB value, however, they paid duty on CFR Benapole (LCS on Bangladesh) value, which resulted into sanctioning of excess rebate claim. Commissioner (Appeals) decided the cases in favour of department.

Now, the applicant has filed these revision applications on grounds mentioned in para (4) above.

9. Government notes that the main issue involved in this case is determination of transaction value for the purpose of sanctioning rebate. Government observes that for proper understanding and consideration of issue involved, the relevant statutory provisions for determination of value of excisable goods are required to be perused and the same are extracted below:-

9.1 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 be the value determined in such manner as may be prescribed.

9.2 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 cognnate 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."

9.3 Place of Removal has been defined under Section 4(3) ©(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

9.4 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 upto the place of delivery of such excisable goods.

Explanation 1. – "Cost of transportation" includes –

(i) The actual cost of transportation; and

(ii) In case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods."

9.5 Government observes that from the perusal of above provisions it is clear that the place of removal may be factory / warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it can not be beyond the port of export /Customs Land Station of the goods. It can be either be factory, warehouse or port/Customs Land Station of export and expenses of freight / insurance 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. The GOI order No.271/05 dated 25.7.05 in the case of CCE Nagpur Vs. M/s Bhagirath Textiles Ltd. reported as 2006 (202) ELT 147 (GOI) has also held as under:-

"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the

Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on more than FOB value.

10. Government notes that Commissioner (Appeals) has given the same finding. But at the same time he has also ordered for recovery of excess paid rebate claim. The impugned Orders-in-Appeal is therefore self contradictory. The freight and insurance incurred upto port of export i.e. Land Customs Station, petrapole in this case, are to be considered as part of 'transaction value' for sanctioning the rebate claim. If any cost in form of freight or otherwise incurred beyond port of export, such cost does not form part of transaction value and duty paid on said part of value being not duty payable under section 3 of Central Excise Act can not be rebated. To sum up, having determined place of export i.e. Land Customs Station, petrapole in this case, the FOB value containing all the cost incurred upto port of export including local freight insurance till petrapole Land Customs Station will from transaction value. Since, the distance between Indian LCS Petrapol and Bangladesh LCS Benapole is stated to be few meters, there cannot be much difference in FOB value as well as value on CFR basis. The transaction value in term of section 4 of Central Excise Act, 1944 is required to be determined and if duty is still found paid excess, the rebate of such on paid duty will be recovered back.

11. Government also observes that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated a voluntary deposit with the Government which is required to be returned to the applicants 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. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate."

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 applicant in the manner in which it was paid by him initially. Applicant has also contended that in case, the cash rebate of said amount is not admissible, then said amount may be allowed to be re-credited in their cenvat credit account. This contention merit acceptance. Since in this case rebate is already sanctioned, the excess paid rebate if any is to be recovered in cash first and then the re-credit of excess paid duty will be allowed in the cenvat credit account.

11. In view of above discussions, Government sets aside the impugned Orders-in-Appeal and remands the case back to original authority for denove consideration of matter in the light of above observations. The applicant is directed to furnish document evidences regarding freight/insurance costs incurred beyond the port of export, before the original authority. A reasonable opportunity of hearing will be afforded to the party.

12. Revision Applications are disposed off in above terms.

13. So ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

M/s GPT Infra Project Ltd.,
Jeewan Satya, DD-6, Sector-I,
Salt Lake City, Kolkata-700064.

ATTESTED

सहायक आयुक्त/Assistant Commissioner
C B E C -O S D (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No.411-430/13-Cx dated 28.05.2013

Copy to:

1. Maritime Commissioner of Central Excise, Kolkata-III, Commissionerate, 180, Shantipally, Rajadanga Main Road, 1st Floor, Kolkata-700107.

2. The Commissioner (Appeals-I), 4th Floor, Bamboo Villa, 169 A.J.C Bose Road, Kolkata 700014.

3. Shri R.K.Sharma, advocate, 157 1st Floor, DDA Office Complex, CM Jhandewalan Extn., New Delhi.

4. PS to JS (RA)

5. Guard File.

6. Spare Copy

ATTESTED

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)