F.No.195/453-455/2012-RA
F.No.195/303/2013-RA
F.No.195/302/2013-RA

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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE

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

F.No.195/453-455/2012-RA
F.No.195/303/2013-RA
F.No.195/302/2013-RA /2826

Date of Issue: 13/12/2018

ORDER NO. 415-419 /2018-CX (WZ)/ASRA/MUMBAI DATED 30.11.2018 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 Tufropes Pvt Ltd

Respondent : Commissioner of Central Excise, Rebate, Raigad.

Subject : Five Revision Applications filed, under Section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal Nos. US/71-73/RGD/2012 dated 9.2.2012, 844/RGD/2012 dated 26.11.2012 and US/847/RGD/2012 dated 22.11.2012 all three passed by the Commissioner(Appeals-II), Central Excise, Mumbai.

Pr. Commr. (RA) & ex-Officio Additional Secretary to the Govt. of India
Mumbai

ORDER

These Five Revision Applications have been filed by M/s Tufropes Pvt Ltd (hereinafter referred to as "the Applicant") against the three Orders-in-Appeal Nos. US/71-73/RGD/2012 dated 9.2.2012, US/844/RGD/2012 dated 26.11.2012 and US/847/RGD/2012 dated 22.11.2012, all passed by the Commissioner(Appeals-II), Central Excise, Mumbai vide which all the three appeals filed by Applicants were dismissed.

2. The issue in brief is that the Applicants is engaged in the manufacture of HDPE ropes and PP ropes falling under Chapter 56 of the First Schedule to the Central Excise Tariff Act, 1985. They import HDPE granules for use in the manufacture of the HDPE ropes under Advance License Scheme Notification No. 93/2004-Cus dated 10.9.2004 and Notification No. 96/2009-Cus dated 11.9.2009 and without payment of CVD and therefore, credit is not availed in respect of the HDPE granules. They clear the HDPE ropes for home consumption as well as for export on payment of duty in terms of Notification No. 29/2004-CE dated 9.7.2004 and in export they claim rebate of the duty paid under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

Sl. No	RA	OIA No. date	OIO No. & date	Total Rebate claims (Rs.)
1	F.No.195/453-455/2012-RA	US/71-73/RGD/2012 dated 9.2.2012 Allowed the Deptt Appeal and the three O-in-O were set aside	1295/10-11/DC(Rebate)/Raigad dt 19.11.2010 Sanctioned	10,36,554
2			1357/10-11/DC(Rebate)/Raigad dt 26.11.2010 Sanctioned	3,60,914
3			1467/10-11/DC(Rebate)/Raigad dt 29.12.2010 Sanctioned	32,49,811

4	F.No.195/303/2013-RA	US/844/RGD/2012 dated 26.11.2012 Upheld the O-in-O and reject the Applicant's appeal	2660/11-12/DC(Rebate)/Raigad dt 31.3.2012 Rejected the claim	48,91,437
5	F.No.195/302/2013-RA	US/847/RGD/2012 dated 22.11.2012	In r/o Sl. 1,2 & 3 above Department filed appeal with Commr(A) and 03 protective SCNs were issued. The same was adjudicated by ADC vide Raigad/ADC/217-219/11-12 dated 26.03.2012 (i)Confirmed and orders recovery of Rs. 10,36,554/-, Rs.3,60,914/- and Rs. 32,49,811/- (ii) interest (iii)no penalty	10,36,554 3,60,914 32,49,811

2.1 In respect of Sr.No. 1 to 4 - the Applicants had filed rebate claims under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004.

2.2 In respect of Sr. 1 to 3, the Assistant Commissioner (Rebate), Central Excise, Raigad Commissionerate sanctioned the rebate claims. Aggrieved, the Department then filed appeals with the Commissioner(Appeals), who vide Order-in-Appeals No. US/71-73/RGD/2012 dated 9.2.2012 allowed the Departmental Appeal and set aside the 03 Orders-in-Original. Aggrieved the Applicant then filed the current 03 Revision Applications.

2.3 In respect of Sl.No. 5- Meanwhile as the Department had filed appeals with Commissioner(Appeals) (Para 2.2 above), the department then issued 03 protective Show Cause Notices, which was adjudicated by

the Additional Commissioner of Central Excise, Raigad vide the impugned Orders-in-Original ADC vide Raigad/ADC/217-219/11-12 dated 26.03.2012, wherein he

(i) Confirmed and orders recovery of Rs. 10,36,554/-, Rs.3,60,914/- and Rs. 32,49,811/- under Section 11A(1) of the Central Excise Act, 1944;

(ii) confirmed interest under Section 11AB of Central Excise Act, 1944;

(iii) No penalty was imposed.

Aggrieved the Applicant then filed appeal with Commissioner(Appeals), who vide Order-in-Appeal No. US/847/RGD/2012 dated 22.11.2012 upheld the O-in-O dated 26.03.2012 and reject the Applicant's appeal. The Applicant then filed the current Revision Applicant.

2.4. In respect of Sr.No. 4, Applicants rebate claim was rejected by the Deputy Commissioner vide Order-in-Original No. 2660/11-12/DC(Rebate)/Raigad dated 31.3.2012. Aggrieved the Applicant then filed appeal with Commissioner(Appeals), who vide Order-in-Appeal US/844/RGD/2012 dated 26.11.2012 upheld the O-in-O dated 31.2.2012 and reject the Applicant's appeal.

3. Being aggrieved, the Applicant filed these Revision Applications on the following grounds:

In respect of 1 to 3

3.1 The Commissioner(Appeals) had held that the Order-in-Original is based on verification reports of Superintendent dated 12.10.2010 stating that they had availed Cenvat credit on input services and capital goods, which is not elevant for availing the benefit under Notification No. 30/2004 dated 9.7.2004 and therefore, the order passed by the Assistant Commissioner sanctioning the rebate claims is incorrect. Even if the certificate/verification report dated 12.10.2010 can be construed that the same was only certifying that credit on capital goods and input service was taken and not on inputs,

the fact on record in the form of their Cenvat Credit Register clearly establishes that credit on input namely master batch was also taken. Therefore submit that the Assistant Commissioner had correctly sanctioned the rebate claims in question by observing that the they had correctly paid duty in terms of Notification No. 29/2004-CE dated 9.7.2004.

3.2 The case of the department is that the said goods exported by the Applicants are exempt from payment of excise duty in terms of Notification No. 30/2004-CE dated 9.7.2004 and that they have incorrectly cleared the said goods on payment of duty in terms of Notification No. 29/2004-CE dated 9.7.2004 and therefore, they are not entitled for rebate of duty paid by them. Notification No. 30/2004-CE dated 9.7.2004 is a conditional exemption notification and the availment of the benefit of the exemption is subject to non-availment of input credit. The Commissioner (Appeals) in the impugned order has ignored the Cenvat Credit Register maintained by the applicants during the period in question, showing that they had availed credit on inputs namely master batch used in the manufacture of the said goods, which is further substantiated by the certificate dated 22/24.3.2011 of Superintendent of Central, Range-I, Division III, Silvasa. They had all along maintained that they are availing credit on inputs used in the manufacture of the said goods and any certificate/document supporting the aforesaid fact can be produced by the applicants at any point in time. In view of the aforesaid factual position, Notification No. 30/2004-CE dated 9.7.2004 is not applicable to them. Accordingly, they have correctly cleared the said goods for export on payment of duty in terms of Notification No. 29/2004-CE dated 9.7.2004. Hence, they are entitled to rebate of the duty paid on the said goods cleared for export. In light of the aforesaid submissions, the case of the department, proceeding on the basis of incorrect facts, is erroneous and contrary to law.

3.3 Further, the impugned order has not disputed the fact that credit on inputs, locally procured, used in the manufacture of the said goods has been availed by the applicants. Once the fact of availment of credit on inputs is not in dispute then the question of availing the benefit of exemption Notification No. 30/2004-CE dated 9.7.2004 9.7.2004 and are thereby, entitled to rebate of the excise duty paid. said goods on payment of excise duty in terms of Notification No. 29/2004-CE does not arise. In view of the above, the they had correctly cleared the said goods on payment of duty in terms of Notification No. 29/2004-CE dated 9.7.2004 and are thereby, entitled to rebate of the Excise duty paid.

3.4 The revenue filed appeal before the Commissioner (Appeals) on the sole ground that the applicants had not availed credit on inputs used in the manufacture of the said goods and therefore, the said goods cleared for export are exempt from payment of duty under Notification No. 30/2004-CE dated 9.7.20004. The case of the revenue being that the applicants have incorrectly paid duty in terms of Notification No. 29/2004-CE dated 9.7.2004.

3.5 The appeal filed by the revenue proceeds on the basis of incorrect facts. The applicants had in fact availed credit on inputs namely master batch used in the manufacture of the said goods, as shown in their Cenvat Credit Register and the said factual position is supported by the certificate dated 22/24.3.2011 of Superintendent of Central Excise. Further, the revenue has not produced any evidence to show that they had not availed credit on inputs used in the manufacture of the said goods exported. There is no basis to ignore the evidence on record in the form of their Cenvat Credit Register as well as the aforesaid certificate. In view of the above, the said goods cleared for export are not exempt under Notification No. 30/2004-CE dated 9.7.2004.

3.6 The revenue had not produced any evidence to show that they had not availed credit on inputs used in the manufacture of the said goods and the ground on which the revenue has filed the appeal is contrary to the facts on record.

3.7 The finding of the Commissioner (Appeals) that Notification No. 30/2004-CE dated 9.7.2004, issued under Section 5(1A) of the Act, is mandatory and they had incorrectly paid duty in terms of Notification No. 29/2004-CE dated 9.7.2004 is incorrect since the said notification is not an unconditional exemption notification.

(i) Clause (1) of Section 5A of the Central Excise Act, 1944 empowers the Central Government to grant exemption from excise duty, either absolute or conditional, by way of a notification. Clause (lA) of Section 5A of the Act clarifies that where such exemption granted under clause (1) is absolute the manufacturer cannot clear the goods covered under such exemption on payment of duty. In other words, an assessee has to mandatorily avail of the absolute exemption granted under clause (1) of Section 5A.

(ii) Notification No. 30/2004-CE dated 9.7.2004 provides exemption from payment of excise duty in respect of the said goods subject to non-availment of input credit. Notification No. 30/2004-CE dated 9.7.2004 is conditional in nature and does not grant absolute exemption. Thus, Notification No. 30/2004-CE dated 9.7.2004 is not mandatory.

(iii) Notification No. 29/2004-CE dated 9.7.2004, issued under Section 5A(1), grants exemption in excess of 8% unconditionally. Notification No. 29/2004-CE is not an absolute exemption and hence, is not mandatory.

In view of the above, both the aforesaid Notifications are not mandatory. The aforesaid notifications are not mutually exclusive and co-exist in the books of law. Therefore, they had the option to choose between them. They had opted for Notification No. 29/2004-CE and had correctly cleared the said goods on payment of duty. Hence the finding of the Commissioner (Appeals) is incorrect and thus, the impugned order is liable to be set aside.

3.8 It is well settled law that when two Notifications - which are not mutually exclusive - co-exist in the books of law. the assessee has the option to choose any one of them. In other words, when two Notifications co-exist simultaneously and do not mutually exclude each other, an assessee has an option to choose between the two Notifications. When pluralities of exemption are available. the assessee has the option to choose any of the exemptions, even if the exemption so chosen is generic and not specific. In this they relied on the case law in Supreme Court in HCL Ltd. Vs. Collector of Customs, New Delhi [2001 (130) ELT 405 (SC)] and few other cases law.

3.9 Notification No. 30/2004-CF. & Notification No. 29/2004-CE co-exist in the books of law and are not mutually exclusive. It is an undisputed fact that both the Notifications under consideration are in existence simultaneously. Both the aforesaid Notifications do not have any provisions excluding the other. In other words, Notification No. 30/2004-CE dated 9.7.2004 does not have any provision stating that the said Notification has an over-riding effect over Notification No.29/2004-CE dated 9.7.2004 and similarly, vice-versa. Thus, both the aforesaid Notifications co-exist simultaneously in the books of law and both the Notifications have been issued under Section 5A of the Central Excise Act, 1944. In view of the settled legal position, the applicants have the option to avail of any of the Notifications. The Central Excise department cannot force any particular Notification on an assessee. An option cannot be converted into an obligation.

3.10 The department has not pointed out any provision under the Central Excise Act or Rules made there-under which has the effect of requiring the assessee to mandatorily avail the benefit of exemption Notification No. 30/2004-CE dated 9.7.2004 only.

3.11 It is a simple case dealing with two Notifications — both issued under Section 5A -which are not mutually exclusive and which are present in the books of law at the same time. In the present case. the applicants opted for Notification No. 29/2004-CE dated 9.7.2004 which prescribes for 8% rate of duty on the said goods falling under Chapter 56. Therefore, by applying the said notification to the said goods duty they had paid on clearance, and had availed credit of duty paid on inputs etc. used in the manufacture of the said goods. The contention of the department that the applicants are incorrect in not following the Nil rate stipulated under Notification No. 30/2004-CE in respect of the said goods is incorrect. In any case, they had correctly paid duty on export of the said goods since Notification No. 30/2004-CE dated 9.7.2004 is not applicable to them. In view of the above, the impugned order is liable to be set aside.

3.12 Notification No, 30/2004-CE dated 9.7.2004 as amended provides that the said goods are chargeable to nil rate of duty. Further, the said notification is not applicable where credit of duty paid on input is availed in respect of the said goods. In the present case, the credit of duty paid on inputs, procured indigenously and used in the manufacture of the said goods, had been availed by the applicants. This fact is not in dispute. Therefore, the said notification is not applicable to the said goods manufactured by them and therefore, they had correctly cleared the said goods for export on payment of excise duty.

3.13 Notification No. 29/2004-CE dated 9.7.2004 as amended is also relevant for the purpose of determining the rate of duty payable on the textile and textile articles falling under Chapter 50 to 63 of the [illegible]

Excise Tariff Act and the said goods are chargeable to duty at 8% adv. without any condition. The said goods are chargeable to basic excise duty 8% advoleram in terms of Notification No. 29/2004-CE, if credit of duty paid on the inputs used in the manufacture of the said goods is taken. Hence they had cleared the said goods on payment of excise duty in terms of Notification No.29/2004-CE dated 9.7.2004 and had correctly paid duty on the said goods on clearance for export.

3.14 The Notification No. 93/2004-Cus dated 10.9.2004 referred to by the Commissioner (Appeals) is not relevant. The Commissioner (Appeals) has not given any finding in respect of the said notification or as to how the said notification is applicable to the present case. Even if the contention of the department is that the applicants are not entitled to rebate of duty paid on the said goods exported in terms of condition (v) of Notification No. 93/2004-CE dated 97.2004, the applicants submitted that there is no violation of the said condition if the rebate claims in question are sanctioned.

3.15 Notification No. 93/2004-Cus dated 10.9.2004 exempts the raw materials imported into India against Advance License for use in manufacture of resultant products to be exported outside India. The Condition No. 5 to the Notification No. 93/2004-Cus reads as under:

> *"that the export obligation as specified in the said licence or authorization (both in value and quantity terms) is discharged within the period specified in the said licence or authorization or within such extended period as may be granted by the Licensing Authority or Regional authority by exporting resultant products, manufactured in India which are specified in the said licence or authorization and in respect of which facility under rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of 19 of the Central Excise Rules, 2002 has not been availed:*
>
> *Provided that an Advance Intermediate Licence holder shall discharge export obligation by supplying the resultant products to ultimate exporter in terms of Paragraph 4.1.3 (b) of the Foreign Trade Policy;"*

The aforesaid condition puts a bar on availing rebate of duty paid on raw materials/inputs and there is no bar on availing rebate of duty paid on finished goods. In the present case, the applicants are not availing rebate of duty paid on raw materials. In view of the above, sanction of rebate of duty paid on the finished goods is not in violation of the aforesaid condition. In any case, the Commissioner (Appeals) has incorrectly referred to the unamended Condition No. 5 of the Notification No. 93/2004-Cus dated 10.9.2004. Hence the sanction of rebate of duty paid on the said goods exported is not in violation of Condition No. 5 of Notification No. 93/2004-Cus. Thus, the rejection of the rebate claims filed by the applicants on this ground is incorrect. Thus, the impugned order is liable to be set aside.

3.16 The reliance placed by the Commissioner (Appeals) on Paragraph 4.4.7 of the Foreign Trade Polioy is misplaced. Firstly, paragraph 4:4.7 deals with Duty Free Import Authorisation (DFIA) Scheme whereas in the present case, the applicants had imported the inputs under the Advance Authorisation Scheme. Secondly, the Commissioner (Appeals) has misquoted the paragraph in question. The said paragraph reads as under:

> *"CENVAT credit facility shall be available for inputs either imported or procured indigenously."*

In view of the above, the Commissioner (Appeals) has incorrectly and erroneously placed reliance on Paragraph 4.4.7 of the Foreign Trade Policy.

3.17 Circular No. 23/93-CX.8 dated 7.12.1993 deals with accounting of goods received under DEEC and the said Circular is not relevant to the present facts. Thus, the reliance placed by the Commissioner (Appeals) on the aforesaid Circular is misplaced.

3.18 Notification No. 203/1992-Cus dated 19.5.1992 is not relevant to the present case on the ground that they had imported the inputs against Advance Licence under Notification No. 93/2004-Cus dated 10.9.2004 and Notification No. 96/2009- Cus dated 11.9.2009. Thus, the reliance placed by the Commissioner (Appeals) on Notification No.

3.19 The Commissioner (Appeals) held that the applicants are not eligible to avail credit on inputs where the goods are exported against Advance Licence. The applicants submitted that they had not availed credit on inputs imported against Advance License for use in manufacture of goods exported. They had only availed credit on inputs procured indigenously and there is no bar on availing of credit on inputs procured indigenously. Thus, the impugned order is liable to be set aside.

3.20 Rule 18 of the Central Excise Rules, 2002 grants rebate of the excise duty paid on goods exported. Conditions and procedures to claim rebate are prescribed under Notification No. 19/2004-CE(NT) dated 6.9.2004. the essential condition prescribed under the said Notification is that the goods shall be exported after payment of duty. The fact that the applicants have made the export is not at all in dispute. The fact that the goods which have been exported have suffered excise duty is also not in dispute. Moreover, there has been no procedural lapse on the part of the applicants and no finding in respect of the same has been given by the Assistant Commissioner in the Order-in-Original. Therefore. they are eligible for the entire claim of rebate. In this they relied on the case of Barot Exports [2006 (203) ELT 321(GOI)]

3.21 They had availed credit of duty paid on inputs, capital goods.. input services used in the manufacture of the said goods in terms of Rule 3(1) of Cenvat Credit Rules, 2004, They further, utilized such credit for payment of excise duty on clearance of the said goods in terms of

Rule 3(4) of Cenvat Credit Rules, 2004. The fact that payment of excise duty in respect of which the rebate claims have been filed, has been made through the Cenvat credit account cannot be a ground to deny refund of the same in cash. In support they placed reliance on the CBEC Circular No. 21/89-CX,6 dated 4.4.1989. The relevant portion of the said Circular is extracted as under:

> *"I am directed to refer to Board's instructions F. No. 8/1 /70-CX.6, dated 15-5-1970 (Circular No. 6/70) wherein it had. inter alia, been clarified in consultation with the Comptroller and Auditor General that rebate could be sanctioned in cash where duties on exported goods were paid through debits in the RG 23 register.*
>
> *2. It has been decided by the Board that the above instructions will mutatLs mulandis, apply even in respect of payments made in respect of export goods through debits in the RG 23A register maintained under MODVAT Scheme. "*

The above Circular issued by the Board is binding on the department and the department cannot take a stand contrary to the same. Accordingly, they submitted that the refund of the duty paid on the said goods exported be granted in cash.

3.22 Prayed that the impugned Order-in-Appead dated 9.2.2012 be set aside and allow the Revision Applications in full.

In respect of Sl.No. 4 & 5

3.23 The Commissioner(Appeals) Orders-in-Appeal Nos US/844/RGD/2012 dated 26.11.2012 and US/847/RGD/2012 dated 22.11.2012 had referred to condition laid down in Notification No. 93/2004-CE dated 9.7.2004 and Notification No. 96/2009 dated 11.9.2009. The said notifications are not relevant to the present case where rebate of duty paid on the finished goods is claimed under Rule 18 of the Central Excise Rules 2001. Further, the Commissioner (Appeals) has not given any finding in respect of the said notifications

or as to how the said notifications are applicable to their present case of sanction of rebate of duty paid on the finished goods exported in terms of the notification issued under Rule 18 of the Central Excise Rules 2001.

3.24 Notification No. 93/2004-Cus dated 10.9.2004 exempts the raw materials imported into India against Advance License for use in manufacture of resultant products to be exported outside India. The Condition No. (V) to the Notification No. 93/2004-Cus -

"that the export obligation as specified in the said licence or authorization (both in value and quantity terms) is discharged within the period specified in the said licence or authorization or within such extended period as may be granted by the Licensing Authority or Regional authority by exporting resultant products, manufactured in India which are specified in the said licence or authorization and in respect of which facility under Rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or sub-rule (2) of 19 of the Central Excise Rules, 2002 has not been availed:

Provided that an Advance Intermediate Licence holder shall discharge export obligation by supplying the resultant products to ultimate exporter in terms of Paragraph 4.1.3 (b) of the Foreign Trade Policy; "

Condition No. (viii) of Custom Notification 96/2009 dated 11.9.2009 –

"(viii) that the export obligation as specified in the said authorization (both in value and quantity terms) is discharged within the period specified in the said authorization or within such extended period as may be granted by the Regional Authority by exporting resultant products, manufactured in India which are specified in the said authorization and in respect of which facility under Rule 18 (rebate of duty paid on materials used in the manufacture of resultant product) or Sub-Rule (2) of Rule 19 of the Central Excise Rules, 2002 has not been availed:

Provided that an Advance Intermediate authorization holder shall discharge export obligation by supplying the resultant products to exporter in terms of paragraph 4.1.3 (ii) of the Foreign Trade Policy: "

The aforesaid condition puts a bar on availing rebate of duty paid on raw materials/inputs used in the manufacture of resultant product exported and there is no bar on availing rebate of duty paid on resultant product or finished goods exported. Further the said Notification do not contain any condition baring the availing Cenvat credit on inputs, raw materials used in the manufacturing of the resultant product or finished goods exported. In the present case, they are not availing rebate of duty paid on raw materials. In view of the above, claiming of rebate of duty paid on the finished goods is not in violation of the aforesaid condition.

3.25 In any case, the Commissioner (Appeals) has incorrectly referred to the un-amended Condition No. 5 of the Notification No. 93/2004-Cus dated 10.9.2004. The sanction of rebate of duty paid on the said goods exported is not in violation of Condition No. 5 of Notification No. 93/2004-Cus. Thus, the rejection of the rebate claims filed by the applicants on this ground is incorrect. Thus, the impugned Order-in-Appeal is liable to be set aside.

3.26 The reliance placed b the Commissioner(Appeals) on Para Trade Policy is misplaced (details as in Para 3.16 above).

3.27 Also, the reliance placed by the Commissioner (Appeals) on Circular No. 23/93-CX.8 dated 7.12.1993 is misplaced.

3.28 Circular No. 23/93-CX.8 dated 7.12.1993 deals with accounting of goods received under DEEC and the said Circular is not relevant to the present facts. Thus, the reliance placed by the Commissioner (Appeals) on the aforesaid Circular is misplaced.

3.29 When two Notifications — which are not mutually exclusive — co-exist in the books of law, the assessee has option to choose any one of them (details as in Para 3.8 above).

3.30 Notification No. 30/2004-CE and Notification No. 29/2004-CE co-exist in the books of law and are not mutually exclusive (details as in Para 3.7 to 3.11 above). In this their submission is supported by CBEC Circular No. 795/28/C004-CX dated 29.7.2004.

3.31. They have correctly paid duty on export of the said goods since Notification No. 30/2004-CE dated 9.7.2004 is not applicable to them. which are not mutually exclusive and which are present in the books of law at the same time (details as in Para 3.12 and 3.13 above).

3.32 The Deputy Commissioner vide Order-in-Original No. 2660/11-12/DC(Rebate)/Raigad dated 31.3.2012 contended that F.O.B. value declared in the ARE-1 including freight and insurance charges cannot be taken as value in terms of Section 4(3)(d) of the Central Excise Act, 1944 hence rejected the refund claim to the extent of part of duty paid on the insurance and freight charges. The said ground taken by Order-in-Original dated 31.3.2012 is improper and not valid in law. Under Section 4(3)(d) of the Central Excise Act, 1944, *"transaction value"* includes any amount that the buyer is liable to pay to the seller by reason of, or in connection with the sale. In the present case, the buyer is liable to pay a composite price which is inclusive of freight and insurance charges upto port of import. In view of this, the freight and insurance charges are part of "transaction value" and hence the Applicant had discharged excise duty on "transaction value" which included freight and insurance charges and is entitled to obtain rebate of whole of the duty of excise paid in respect of goods exported.

3.33 The rebate claim filed by them cannot be restricted to the duty payable on FOB value, the same being less than the corresponding ARE-1 value (Refer S. No. 15 & 16 of Annexure A of the impugned Order-in-Original No. 2660/11-12/DC(Rebate)/Raigad dated 31.3.2012). In this respect, they relied on Para 4.1 of Chapter 8 of CBEC Manual –

"4.1 The value shall be the "transaction value" and should confirm to section 4 or section 4A, as the case may be, of the Central Excise Act,

1944. It is clarified that this value may be less than, equal to or more than the FOB value indicated by the exporter on the Shipping Bill."

The above has been fortified by CBEC vide its Circular No. 510/06/2000-CX dated 3.2.2000 wherein CBEC was, inter alia, concerned with the issue as to whether once duty is paid, should the rebate be reduced. The CBEC categorically held that rebate cannot be reduced. The relevant portion of the Circular is reproduced below:

"2. The Board has examined the matter. It is clarified that in aforementioned case, the duty on export goods should be paid by applying market rate as it prevails at the time the duty is paid on such goods. Once value (in accordance with section 4 of the Central Excise Act, 1944) is determined and duty is paid, rebate has to be allowed equivalent to the duty paid. Board has already clarified in Circular No. 203/37/96-CX dated 26.4.96 that AR-4 value is to be determined under section 4 of the Central Excise Act, 1944 and this value is relevant for the purposes of rule 12 & rule 13. Thus, the duty element shown on AR-4 has to be rebated, if the jurisdictional Range officer certifies it to be correct. There is no question of re-quantifying the amount of rebate by the rebate sanctioning authority by applying some other rate of exchange prevalent subsequent to the date on which the duty was paid. It is also clarified that the rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of the duty paid on the export goods covered by a claim."

In view of the above, the finding of the Deputy Commissioner that rebate on FOB value alone is available is not correct. In the present case, there is no dispute that the Applicants have paid excise duty on "transaction value" under Section 4. Hence, there is no question of denying any portion of the rebate claim. In this, an identical dispute arose before CESTAT in the case of Sterlite Industries Ltd. Vs. CCE [2009 (236) ELT 143 (T)] wherein the CESTAT allowed the rebate claim on CIF value and rejected the Revenue's attempt to restrict the

rebate claim to excise duty on FOB value. The CESTAT also relied upon CBEC Circular dated 3.2.2000 referred supra. Further, the impugned US/844/RGD/2012 dated 26.11.2012 is silent on the above ground and has not given any findings on the above ground taken by Deputy Commissioner in Order-in-Original date 31.3.2012. Commissioner (Appeals - II) has ignored the above submission made by the Applicants and rejected the whole appeal without given proper explanation contrary to the above submission of the applicants. Hence the Order-in Appeal dated 26.11.2012 is liable to be set aside.

3.34 They are entitled to refund of the entire duty paid on the said goods exported (details same as in Para 3.20 above).

3.35 They are entitled to claim rebate in case (details same as in Para 3.21 above).

3.36 The impugned Order-in-Appeal has travelled beyond the scope of Show Cause Notice and therefore the same is liable to be set aside on this count alone. The Show Cause Notice were issued to the them on the ground that the Applicant is wrong in not availing the exemption under Notification No.30/2004-C.E. The is no whisper of any other allegation in the Show Cause Notice to deny the eligibility for cenvat credit. The Order-in-Original has also relied on the same ground. Impugned order-in-Appeal is passed on the grounds that Applicants is not complying with the condition laid down in Customs Notification No 93/1004 and Notification No. 96/2009 and condition as laid down in Foreign Trade Policy (Para 4.4.7). The Applicants submitted that there is no need to prove any fact which has not been disputed in the Show Cause Notice. They need to defend only the charge made against them in the Show Cause Notice. Therefore, the findings of the impugned Order-in-Appeal that refund claim is rejected on the above grounds is beyond the scope of Show Cause Notice. Hence, the Show Cause Notice is liable to be set aside. In this they relied in the case of CC Vs. Toyo Engineering India Limited [2006 (201) ELT 513 (SC)]

wherein it has been held that the department cannot travel beyond the scope of the show cause notice. Hence the impugned Order-in-Original is liable to be set aside on this ground itself.

3.37 They prayed that the impugned Orders-in Appeals Nos. US/844/RGD/2012 dated 26.11.2012 and US/847/RGD/2012 dated 22.11.2012 be set aside and allow the Revision Applications in full.

4. A personal hearing in the case was held on 19.012018, 06.02.2018 and 19.06.2018. However neither the Applicant nor his Advocate attended the said hearings. Hence the case is being decided exparte on merits. .

5. Government has carefully gone through the relevant case records available in case files & written submissions and perused the impugned Orders-in-Original and Orders-in-Appeal.

6. On perusal of records, Government observes that Applicants are, inter alia engaged in the manufacture of HDPE Ropes and PP Ropes. They had imported HDPE granules for use in the manufacture of the HDPE ropes under Advance License Scheme Notification No. 93/2004-Cus dated 10.9.2004 and Notification No. 96/2009-Cus dated 11.9.2009 and without payment of CVD and therefore, credit is not availed in respect of the HDPE granules. They clear the HDPE ropes for home consumption as well as for export on payment of duty in terms of Notification No. 29/2004-CE dated 9.7.2004 and in export they claim rebate of the duty paid under Rule 18 of Central Excise Rules, 2002 read with Notification No. 19/2004-CE(NT) dated 06.09.2004. Further, they indigenously procure other raw materials viz. master batch and packing material which are duty paid and they avail credit of duty paid on such raw materials.

7. Governments notes that the issue involved in all the five revision applications are same :

(i) Whether the exported goods were exempted under Notification No. 30/2004-CE dated 09.07.2004 or were chargeable to duty under Notification No. 29/2004-CE dated 09/07/2004;

(ii) Whether the rebate claimed by them was admissible.

8. Government observed that the jurisdictional Superintendent of Central Excise, Range-I, Division III, Silvassa vide letter F.No. SLV-I/Div.III/Rebate/09-10/101 dated 22.03.2011 in his verification report addressed to the Superintendent (Rebate), Office of the Maritime Commissioner, Central Excise, Raigad -

> *"02. In this context, the facts have been verified from the recored and found that the assessee has been availing the Cenvat credit of the duty paid on input, input service and capital goods and cleared the finished goods on payment of duty for home consumption as well as export under Notification No. 29/2004-CE dated 09.07.2004. It is to report that it was not mentioned in this office letter File of even no. dated 12.10.2011 that the assessee has not availed the credit of duty paid on inputs used for manufacture of final products cleared for home consumption or export under rebate. As far the matter is concerned for availment of Notification No. 30/2004 by the assessee, your kind attention is invited to the fact that the said notification is conditional with condition to not avail the credit of duty paid on inputs, hence it is not mandatory part of the assessee to avail the notification in question, this fact has also been clarified vide Board Circular No. 940/1/2011-CX dated 14.01.2011. In the said circular, it has been clarified that "in view of the specific bar provided under sub-section (1A) of Section 5A of the Central Excise Act, 1944, the manufacturer cannot option to pay the duty in respect of unconditionally fully exempted goods and cannot avail the Cenvat curedit of the duty paid on inputs". Hence, there is no bar on the assessee to not opt the payment of duty. Further, it is to mention that the assessee has all aready clarified that they have not properly mentioned in respect of availment of Cenvat credit of duty paid on inputs in the ARE-1 on account of some misconception, other wise, there is no question that they have availed the credit of duty paid on the inputs and cleared the goods on payment of duty for*

export and home consumption in terms of notification no. 29/2004-CE dated 09/.07.2004.

03. In view of the above, it is clear that the assessee has correctly availed the notification no. 29/2004-CE dated 09/.07.2004 for clearance of goods under home consumption and export."

Government notes that the jurisdictional Superintendent has certified the factual position that the Applicant has been availing the Cenvat credit of the duty paid on input, input service and capital goods and cleared the finished goods on payment of duty for home consumption as well as export under Notification No. 29/2004-CE dated 09.07.2004.

9. Government notes that Notification No. 30/2004-CE dated 09.07.2004 is a conditional notification –

"G.S.R. (E) In exercise....., ... from the whole of duty of excisable leviable thereon under the said Central Excise Act :

Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of the CENVAT Credit Rules."

10. Government notes that Section 5A(1A)

"Section 5A. Power to grant exemption from duty of excise. *(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:*

Provided *that, unless specifically provided in such notification, no exemption therein shall apply to excisable goods which are produced or manufactured –*

(i) in a free trade zone or a special economic zone and brought to any other place in India; or

(ii) by a hundred per cent export-oriented undertaking and brought to any place in India.

Explanation. *- In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3. (1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.*

Here it is evident that a manufacturer is obliged to compulsorily avail an exemption only when such exemption has been granted absolutely and not in any other case.

11. Government notes that from the proviso to Notification No. 30/2004-CE dated 09.07.2004, it is clear that the exemption is not absolute, but conditional i.e. the manufacture shall not avail Cenvat credit on inputs, wherein the present case the Applicant has availed Cenvat credit on inputs used in the manufacture of exported goods as declared and had cleared the goods on payment of duty which was verified by the jurisdictional Superintendent vide letter 22.03.2011(Para 9 above). Hence, when the condition of the Notification was not satisfied, there was no way they could have availed Notification No. 30/2004-CE dated 09.07.2004 and consequently Section 5A(1A) of the Central Excise Act, 1944, has no application whatsoever to the facts of the present case. In view of above, therefore, Government finds that the Applicant herein are eligible for rebates in the manner it was granted by the original rebate sanctioning authorities in the following Orders-in-Original :

(i) No. 1295/10-11/DC(Rebate)/Raigad dt 19.11.2010

(ii) No. 1357/10-11/DC(Rebate)/Raigad dt 26.11.2010

(iii) No. 1467/10-11/DC(Rebate)/Raigad dt 29.12.2010

12. Government notes that that the similar issue involved in the current Revision Applications has already been dealt by the Joint Secretary (Revision Application), vide Order No. 1755-1756/2012-CX dated 18.12.2012 [2014 (314) ELT 890(GOI)]

13. In view of the above, Government sets aside all the impugned Orders-in-Appeal Nos. US/71-73/RGD/2012 dated 9.2.2012, US/844/RGD/2012 dated 26.11.2012 and US/847/RGD/2012 dated 22.11.2012 passed by the Commissioner(Appeals-II), Central Excise, Mumbai and Orders-in-Original Nos 2660/11-12/DC(Rebate)/Raigad dated 31.3.2012 and Raigad/ADC/217-219/11-12 dated 26.03.2012 and allows the instant five Revision Applications filed by the Applicant

14. So, ordered.

30.11.18

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

ORDER No. 415-419 /2018-CX (WZ)/ASRA/Mumbai DATED 30.11.2018.

To,

1. The Commissioner of Central Excise, Raigad.

2. M/s Tuffyropes Pvt Ltd.,
812-A, Embassy Centre,
Nariman Point,
Mumbai 400 021.

Copy to:

1. The Commissioner of Central Excise, (Appeals-II), Mumbai
2. The Dy / Asstt Commissioner(Rebate), GST & CX Mumbai, Belapur.
3. Sr. P.S. to AS (RA), Mumbai
4. Guard file
5. Spare Copy.