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. 380/36/DBK/13-RA/1228 Date of Issue:- 23.02.2021

ORDER NO. 42 /2021-CUS(WZ)/ASRA/MUMBAI DATED 12 .02.2021 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.

| Sl. No. | Revision Application No. | Applicant | Respondent |
|---|---|---|---|
| 1 | 380/36/DBK/13-RA | The Commissioner of Central Excise, Pune – III. | M/s Cummins India Ltd., Pune. |

**Subject**: Revision applications filed under Section 129DD of the Customs Act, 1962, against the Order in Appeal No. PIII/RP/292 to 294/2012 dated 14.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

## ORDER

This Revision application is filed by the Commissioner of Central Excise, Pune –III Commissionerate (hereinafter referred to as the 'the department') against the Orders-In-Appeal No. PIII/RP/292 to 294/2012 dated 14.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune.

2. The brief facts of the case are M/s Cummins India Ltd., Kothrud, Pune (hereinafter referred to as 'the respondent') had submitted applications for fixation of Brand Rate of Drawback under Rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 for the amounts of Rs. 5,74,78,549/-, Rs. 1,49,62,646/- and Rs. 47,31,115/-. The impugned Brand Rate Fixation applications were rejected by the department on the grounds mentioned below :-

2.1 The respondent have availed the drawback under Rule 3 of Drawback Rules declaring the sub serial number of the All Industry Rate of Drawback.

2.2 As per EDI system, AIR of drawback amount is sanctioned and credited directly to the exporter's bank account.

2.3 Subsequently applications were filed by the respondent to claim Special Brand Rate of Drawback under Rule 7.

2.4 To export the goods by declaring the intention to avail AIR under Rule 3 and later on to claim Brand Rate under Rule 7 will amount to revision in the shipping bill subsequent to export and without authority of law.

2.5 The respondent declared in the shipping bills of applications, only to avail AIR of drawback by mentioning relevant S.S. No. of the drawback schedule.

2.6 Rule 7 is an exception to the mandatory Rule 3 of DBK Rules. The applicants are manufacturer and exporter of electrical, electronic and fibre optic

3. Being aggrieved by the said order, the applicant filed an appeal before Commissioner (Appeals-III), Central Excise, Pune. The appellate authority vide impugned Order in Appeal see aside the decisions of rejection of brand applications and directed the department to fix brand rate under Rule 7 of the Drawback Rules, 1995. The appellate authority while passing impugned Order in Appeal observed that :-

3.1 Similar applications of the respondent were processed by the Brand Rate Unit, Pune –III Central Excise Commissioneratein the past and special brand rate under Rule 7 was fixed for similar goods exported on which drawback under Rule 3 at AIR had already been sanctioned to the respondents by Customs. There had been a change of practice, even though there had been neither any change in the legal provisions relating to drawback in the Customs Act, 1962.

3.2 The letter dated 30.12.2011 of the Board repeatedly emphasises declaration of sub serial / tariff item no. 98.01 of drawback schedule in the shipping bill if the exporter intents to first avail drawback under Rule 3 and subsequently files application for fixation of special Brand Rate under Rule 7. It is noticed that during the relevant period when these exports were made i.e. 2010-11 and 2011-12, there was no Tariff Item No. 98.01 in the drawback schedule.

3.3 Prior to receipt of Board's letter dated 30.12.2011, special brand rates were being regularly fixed under Rule 7 by Brand Rate Unit of Pune –III Commissionerate in respect of the respondents. It has been confirmed by Pune –III, Central Excise Commissionerate that no appeals had been filed till date in respect of such special brand rates fixed for the period earlier to 30.12.2011.

3.4 The shipping bil in respect of which the present three appeals have been filed were filed by the respondent and assessed by Customs before Board's letter dated 30.12.2011 was issued. Therefore the said clarification was not available at the time of filing of shipping bills.

4. Aggrieved by the said order, the department filed instant Revision Application on following grounds :-

4.1 As per the law and procedure, the exporter at the time of filing shipping bill has to specifically indicate the sub serial / tariff item no. of the drawback schedule under which he intends to claim drawback in respect of goods exported. However, in case he intends to file application for fixation of Special Brand Rate of drawback under Rule 7, he is required to indicate sub serial no. 9801 in the shipping bill. The respondent, however, in this case had not indicated their intention to file applications for fixation of special brand rate of drawback at the time of export by indicating the tariff item no. 9801.

4.2 Rule 7 is meant for exceptional cases where AIR prescribed is substantially lower than the input duty on the imported goods. Rule 7 is exception to the mandatory rule of Rule 3 of Drawback Rules.

4.3 The issue had been clarified by the CBEC vide letter F. no. 6060/04/3022-DBK dated 30.12.2011. The clarifications issued by the Board in the letter make it evident that the provisions of Drawback Rules do not provide that an exporter can avail AIR Drawback first at the time of export under specified sub serial no. of the AIR schedule and then file for determination of the Brand Rate under Rule

4.4 the Customs Manual indicates the procedure for claiming duty drawback states that the Brand Rate of duty drawback is to be claimed by the exporter at the time of export and the requisite particulars have to be filled in the relevant part of the shipping bills.

4.4 The respondent are bound to follow the instructions given in Public Notice for flowing the EDI procedure.

5. Shri Sandeep Sachdeva, Advocate appeared for the personal hearing fixed by my predecessor on 11.12.2019 and filed additional submissions on behalf of the respondent. Shri Sandeep Sachdeva, Advocate submitted that :-

5.1 There is no specific provision which debars and exporter from seeking determination of Brand Rate of drawback merely because at the time of export it already claimed AIR of drawback and the case of respondent is squarely covered by the Bombay High Court judgement in the case of Alfa Laval (india) Ltd. [2014(309) ELT 17 (Bom.)].

5.2 In any case the order of the jurisdictional High Court is binding on the adjudicating and appellate authorities within its jurisdiction.

5.3 In any case if the Circular dated 30.12.2011, based on which the Brand Rate drawback is denied to the Respondent, is struck down by the High Court the application of the applicant is liable to be rejected.

6. A Personal Hearing in the matter was held on 01.12.2020, 04.12.2020, 09.12.2020 and 29.01.2021. No one appeared for the personal hearings so fixed from the side of Department. A Personal hearing in this case was held on 27.01.2021 through video conferencing and Shri Arpit Push, Advocate appeared on line and stated that the Appellate Authority has rightly allowed drawback and same may be maintained. He submitted that a letter from CBEC to Pune Commissionerate cannot overrule provisions of Rules & statute. He further submitted that Bombay High Court in the case of Alpha Laval has decided the issue finally.

7. Government has carefully gone through the relevant case records available in case file, oral & written submissions and perused the impugned Order-in-Original and Order-in-Appeal.

8. The Government finds that the issue needs to be decided in the instant revision application is whether the applicant, who, at the time of export of the goods, have claimed and been granted drawback at AIR under Rule 3 of Drawback Rules are barred from making an application for determination of the brand rate of drawback under Rule 7, when the amount or rate of drawback determined under Rule 3, or revised under Rule 4, is less than 4/5th (80%) of the

duties or taxes paid on the inputs / input services used in the production or manufacture of the exported goods.

9. Government finds that the applicant had claimed All Industry Rate (AIR) of Drawback as determined under Rule 3 of the Drawback Rules,1995 on goods exported by them. Subsequently, the applicant filed application for fixation of Brand Rate of Drawback under Rule 7 of the Drawback Rules After availment of the said Drawback. Thus it is observed that initially the applicant exported the goods and claimed All Industry Rate of drawback. Subsequently, the applicant wanted to change the same into a claim of fixation of Brand Rate. The lower authorities have objected to it stating that applicants had opted for drawback under AIR in the Shipping Bills which would disentitle them from claiming brand rate of drawback under Rule 7.

10. The Government observes that the department has contested the order in appeal mainly based upon the clarification issued by the Board vide its letter F. No. 606/04/2011-DBK, dated 30-12-2011. , the C.B.E. & C. It is found that the appellate authority has discussed this issue at length in para 15 of the impugned order which read as under :-

*"15.....*

*Thus it is clearly emerges that on receipt of Board's said letter 30.12.2011, the practice of fixation of Special Brand Rate has undergone a change in the Brand Rate Unit of Pune-III Commissionerate even though there has been no change in legal provisions governing Drawback in the Customs Act or DBK Rules. Further neither the Board's letter dated 30.12.2011 is in Public domain nor any circular has been issued by the Board since 30.12.2011 making it mandatory to mention Tariff Item 98.01 in the Shipping Bills when the exporter intends to claim Drawback under Rule 7 of DBK Rules after claiming and getting Drawback amount at All Industry Rate under Rule 3 immediately after*

*export of goods. It is also noticed that the said letter dated 30.12.2011 issued by the Board is only a reply given on certain doubts raised by Pune –I Central Excise Commissionerate. It is also noticed that no Public Notice has ben issued by Pune–III Commissionerate informing exporters about change of practice of fixation of Brand Rate under Rule 7. "*

11. The Government finds that the C.B.E. & C. in its Circular No. 10/2003-Cus., dated 17-2-2003 clarified that henceforth in all those cases where the exporters have applied for brand rate of drawback, they may be permitted the duty drawback at All Industry Rate as admissible under the relevant Sr. No. of duty drawback table and subsequently when exporters are issued brand rate of drawback, the differential amount may be sanctioned to them.

12. Government observes that in a situation as above, it pertinent to consider and proceed in the matter in the light of Hon'ble High Court's observations in the case of *M/s. Alpha Laval (India) Ltd. Vs. UOI* - 2014 (309) E.L.T. 17 (BOM.). The relevant paras of the judgment are as under:-

*""**23.** On a careful and conjoint reading of the aforesaid Rules, we do not find that there is any prohibition set out in the Drawback Rules which debars an exporter from seeking determination of the Brand Rate of drawback under Rule 7, merely because at the time of export, he had already claimed the All Industry Rate of drawback under Rule 3. In fact, to our mind, the Rules seem to suggest otherwise. Firstly, Rule 3 which deals with "drawback", itself stipulates when drawback is not to be allowed [see second proviso to Rule 3(1)]. Despite specifying certain situations when, drawback is not be allowed, we do not find any provision specified therein barring an exporter from seeking a determination of the Brand Rate of drawback under Rule 7, merely because, at the time of export, he applied for the grant of the All Industry Rate of drawback under Rule 3. Secondly, Rule 7 categorically provides that where in respect of any goods, the manufacturer or exporter finds that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of said goods, he may make an application within sixty days for determination of the amount or rate of drawback thereof under Rule 7, disclosing all the relevant facts and subject to the other conditions stipulated under Rule 7. The word "finds" appearing in Rule 7 after the words "manufacturer or exporter", ex facie indicates that it is only once the manufacturer or exporter comes to the conclusion that the amount or rate of drawback determined under Rule 3 is less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the exported goods, can he make an application for determining the Brand Rate of drawback under Rule 7. There could certainly be instances where the manufacturer or exporter would not, at the*

*time of export, be able to determine and/or come to the conclusion that the rate of drawback determined under Rule 3 for the specified exported goods, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services used in the production or manufacture of the said exported goods. To cover this difference, Rule 7(1) allows the manufacturer or exporter to make an application in this regard and claim the difference, provided the rate of drawback determined under Rule 3, is in fact less than 4/5th of the duties or taxes paid on the inputs/input services, used in the production or manufacture of the said exported goods. In other words, if the rate of drawback as determined under Rule 3 is more than 4/5th (80%) of the duties or taxes paid on the inputs/input services used, then the application made under Rule 7(1) would have to be rejected.*

**24.** *In arriving at the above conclusion, we also get assistance by what is stated in Rule 7(3). Sub-rule (3) of Rule 7 inter alia provides that where a person applies for determination of the Brand Rate of Duty Drawback under Rule 7(1), then pending the application, he may provisionally apply for being granted duty drawback as determined under Rule 3 subject to executing a bond as stipulated therein. This position is even accepted by Mr. Jetly. If we were to accept the submission of the Revenue, that once an exporter or a manufacturer was to apply for drawback at the All Industry Rate under Rule 3, he would be debarred from seeking determination of the Brand Rate of drawback under Rule 7, then no exporter at the first instance, would ever apply for drawback at the All Industry Rate determined under Rule 3, and would always apply under Rule 7(1) for seeking determination of the Brand Rate of drawback, along with an application under Rule 7(3) for the grant of provisional duty drawback at the All Industry Rate as determined under Rule 3. This could not have been the intention of the Legislature or the Central government at the time of bringing into force the Drawback Rules. There is nothing else that has been brought to our notice, either in the Customs Act, 1962 or the Drawback Rules, that could even impliedly spell out the prohibition, as sought to be contended by Mr. Jetly. We therefore hold that the manufacturer or exporter is not barred from seeking a determination of the Brand Rate of drawback under Rule 7 merely because, at the time of export, he had applied for and granted drawback at the All Industry Rate as determined under Rule 3. Our view also finds support in the language of the First proviso to Rule 3(1) and far from any prohibition in applying for Drawback in terms of Rule 7. Rule 7 comes into play only in cases where the amount or rate of drawback is low and not otherwise. The apprehension of Mr. Jetly is taken care of by the clear language of Rule 7(1) and the use of the words "determined under Rule 3" or "revised under Rule 4". It is also taken care of by the wordings of sub-rule 3 of Rule 7.*

**25.** *Having held so, we now turn our attention to the Circular dated 30th December, 2011 issued by the C.B.E. & C. The relevant portion of said Circular reads as under :-*

> *"2. On examining the matter it is noted that :*
>
> *(a) As per Rule 7 of the Drawback Rules, 1995, if the exporter finds that the amount or rate of Drawback determined under notified AIR drawback under Rule 3 or 4 is less than four fifth of the duties and taxes suffered on inputs/input services used in manufacture of export goods, he may within specified period apply before the jurisdictional Central Excise Commissioner for determination of amount or rate of drawback (Brand Rate). Here, it must be kept in mind that the AIR drawback determined under Rule 3 or 4 of the Drawback Rules is specified in the Drawback Schedule by notification. The exporter can compare this with the facts of his case and decide if it is less than four fifth of the duties and taxes suffered and also whether he wants to apply for fixation of Brand Rate in*

*his case.*

*(b) If the exporter chooses to opt for Brand Rate, then the exporter makes declaration in the Shipping Bill mentioning drawback sub serial/Tariff Item Number as 9801. Then, within the specified time from let expert date, the exporter applies for Brand Rate of drawback before the jurisdictional Central Excise authority. During the pendency of this application, the exporter may be allowed the facilitation under the Board's Circular No. 10/2003 subject to necessary conditions.*

*(c) After the jurisdictional Central Excise authority fixes/sanctions Brand Rate, the matter goes back to the customs at the port of export for making the requisite payment, with reference to the exporter's declaration of having opted for Brand Rate by specifying the drawback Tariff Item No. as 9801 in the Shipping Bill at the time of export. It is this option that enables the Shipping Bill to be brought back into drawback queue for payment of Brand Rate.*

*(d) Thus, provisions do not provide that an exporter can avail the AIR Drawback first at the time of export under specified sub serial/Tariff Item number of the AIR schedule and then file for determination of the Brand Rate under Rule 7. Exporter's declaration of Tariff Item number other than 9801 on the Shipping bill is declaration that he is satisfied with the AIR rate and opts for it. Any other interpretation would also undermine the entire EDI procedure in this respect."*

**26.** *On reading the Circular, and particularly Paragraph (d) thereof, it is clear that the Circular seeks to interpret the Rules to mean that an exporter once having availed the All Industry Rate of drawback at the time of export, cannot file an application for determination of the Brand Rate of drawback under Rule 7. As discussed earlier, on a plain reading of the Drawback, Rules, we do not find any such prohibition as is sought to be culled out by the C.B.E. & C. in its Circular dated 30th December, 2011. The C.B.E. & C. whilst clarifying the said Drawback Rules, has imposed limitations/restrictions which are clearly not provided for in the Rules, and has the effect of whittling down the Drawback Rules. Under the grab of clarifying the Rules, the C.B.E. & C. cannot incorporate a restriction/limitation, which does not find place in the Drawback Rules. In Clause (d) of the Circular cannot be reconciled with Clauses (b) and (c) thereof. Hence, read together and harmoniously it will have to be held that the Circular cannot override the Rules and particularly Rules 3 and 7 of the Drawback Rules and the sub-rules thereunder. This being the case, Clause (d) of the said Circular is clearly unsustainable and has to be struck down. On the same parity of reasoning, and more so because the orders/letters impugned herein, rely upon the said Circular to reject the applications of the Petitioner seeking determination of the Brand Rate of drawback under Rule 7, even the said impugned orders/letters will have to be set aside.*

**27.** *In view of our discussion in this judgment, Clause (d) of the said Circular dated 30th December, 2011 issued by the C.B.E. & C. as well as the impugned orders dated 27th September, 2012 issued by Respondent No. 3, and the orders/letters dated 19th April, 2012, 11th June, 2012 and 24th July, 2012 issued by Respondent No. 5, cannot be sustained. The rule is, therefore, made absolute and the Petition is granted in terms of prayer Clauses (a) and (b). The Respondents are therefore directed to forthwith accept the applications of the Petitioner as set out in Paragraph 10 of the Petition and process the same as per the provisions of Rule 7 of the Drawback Rules. It is needless to add that if the authorities find that the applications made under Rule 7 do not comply with the provisions of the Rules, the authorities are free to reject the same in accordance with law. The Writ Petition is accordingly disposed off. There shall be no order as to costs."*

The Government finds that the issue involved in the instant case is similar to the case cited above, the ratio of the above referred order of Hon'ble Bombay High Court is squarely applicable to the instant case.

13. In view of above position, Government holds that the Appellate Authority has rightly directed the department to fix brand rates under Rule 7 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 in respect of fourteen applications covered by the rejections letters.

14. Government, therefore, does not find any reason to modify Orders in Appeal No. PIII/RP/292 to 294/2012 dated 14.12.2012 passed by the Commissioner (Appeals-III), Central Excise, Pune and therefore refrains from exercising its revisionary powers in these Revision Applications.

15. The revision application is disposed off in the above terms.

12/02/21

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

To,

The Commissioner of CGST,
*Pune – II Commissionerate,*
41-A,"GST Bhavan", Sasoon Road Pune,
Opposite Ness Wadia College,
Pune - 411 001.

*Copy to :*

1. M/s Cummins India Ltd., Kothrud, Pune, Pune – 411 038.
2. The Commissioner of CGST, Pune Appeals-II, GST Bhavan, F Wing, 2nd floor, 41-A, Sassoon Road, P.B. No. 121, Pune - 411 001.
3. ~~Guard File.~~ Sr PS to AS
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ATTESTED

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Revision Application
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