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. 380/107/DBK/13-RA
F. No. 380/108/DBK/13-RA
F. No. 380/109/DBK/13-RA

Date of Issue: 10.03.2021

ORDER NO. 57-59 /2021 -CUS (WZ) /ASRA/MUMBAI DATED 08.03.2021 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.

Subject : Revision Applications filed under Section 129DD of the Customs Act, 1962 against OIA No. 606-608/Commr(A)/KDL/2013 dated 02.09.2013 passed by the Commissioner of Customs(Appeals), Kandla.

Applicant : Commissioner of Customs, Custom House, Kandla-370 210 (Gujarat)

Respondent : (i) M/s Narayan Trading Co., Indore (M.P.) (A Unit of Narayan Niryat India Pvt. Ltd. Indore (M.P.).

(ii) M/s. Ambika Solvex Ltd., Indore (M.P.).

(iii) Shri Kailash Chandra Garg, Indore (M.P.).

ORDER

These revision applications have been filed by the Commissioner of Customs, Custom House, Kandla (hereinafter referred to as "the applicant" or "the Department") against Order in Appeal No. 606 to 608/Commr(A)/KDL/2013 dated 02.09.2013 passed by the Commissioner of Customs(Appeals), Kandla in the case of (i) M/s Narayan Trading Co. (A Unit of Narayan Niryat India Pvt. Ltd. Indore (M.P.), (respondent No. 1), (ii) M/s. Ambika Solvex Ltd., Indore, (M.P.) (respondent No. 2) and (iii) Shri Kailash Chandra Garg (respondent No. 3).

2.1 The brief facts of the case are that respondent No. 1 are engaged in export of agriculture products including Soya Bean De Oiled Cake & Soya Bean Meal (hereinafter referred to as DOC & SBM resp. for brevity) falling under Tariff Item No. 2304 0020 & 23040030 of the First Schedule to the Customs Tariff Act, 1975. Shri Kailash Chandra Garg (hereinafter referred to as "respondent No. 3") was the Director of respondent No. 1 company at the relevant time. The respondent no. 2 is the manufacturer of Soya Oil and Soya DOC by solvent extraction process using Hexane as solvent in their factories at jaora, Kalapeepal and Akola and sold the DOC to the respondent No. 1 who had exported the same through Kandla Port.

2.2 An intelligence gathered by the Directorate General of Central Excise Intelligence (DGCEI) , Regional Unit, Indore indicated that the respondent no. 1 had exported the Soya Meal and DOC by availing the benefit under Duty Drawback. The said DOC was purchased by them from the manufacturers who had manufactured the same by procuring hexane without payment of central excise duty by following the procedure as prescribed under Rule 19(2) of the Central Excise Rules, 2002 and notifications issued thereunder. The said hexane procured without payment of central excise duty was used in the manufacture of DOC and such DOC was exported by respondent No. 1 under claim of duty drawback @ 1% of FOB value as per All Industry Rate of Drawback (Sr. No. 23) prescribed vide Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 superseded by Notification No. 103/2008-Cus(NT) dated 29.08.2008.

2.3 In view of the provisions of Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 and condition 7(f) of the Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007(and other

similar notifications), it appeared that All Industry Rate of Drawback specified under the Schedule annexed to Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007, as amended, from time to time(and other similar notifications) are not admissible on export of DOC if the same is manufactured in terms of sub-rule (2) of Rule 19 of the CER, 2002 by using excisable material(hexane) in respect of which duties have not been paid.

3. The case was investigated by DGCEI, Indore and show cause notice issued to all the respondents asking as to why the Drawback claim of Rs.2,25,87,676/- should not be disallowed and why penalty should not be imposed upon the exporter, its Director and the manufacturer. The case was adjudicated by the Additional Commissioner (DBK), Custom House, Kandla who vide Order in Original No. KDL/DBK/01/ADC/SS/2012-13 dated 05.03.2013 ordered to recover the DBK amount of Rs.2,25,87,676/- along with interest and imposed penalty of Rs. 1 crore on respondent No. 1, Rs. 1 crore on respondent No. 2 and Rs. 50 lakhs on respondent No. 3.

4. Being aggrieved with the aforesaid Order in Original, the respondents' filed appeal before Commissioner (Appeals) on various grounds. Commissioner (Appeals) vide his Order in Appeal No. 606 to 608/2013/Cus/Commr(A)/KDL dated 02.09.2013 observed that the exporter will be eligible for 1% drawback even if the appellant has availed benefit under Rule 19(2) of CER 2002, in view of the fact that conditions specified under Notification No. 81/2006-Cus. (NT) dtd 13.07.2006 and Notification No. 103/2008-Cus. (NT) dtd. 29.08.2008 regarding availment of Rule 19(2) are identical. Besides this, he also found that amount of drawback had been claimed @ 1% on FOB value as Customs allocation in terms of chapter 23 of drawback schedule as per Notification No. 103/2008-Cus. (NT) dtd. 29.08.2008. Further, he also found that Board vide Circular No. 35/2010 dated-Cus. Dtd. 17.09.2010 has clarified that the Notification No. 84/2010-Cus. (NT) dated 17.09.2010 provides that Customs component of AIR drawback shall be available even if rebate of Central Excise Duty paid on the raw material used in the manufacture of the export goods has been taken in terms of Rule 18 of Central Excise Rules 2002 or if such raw materials were procured without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules 2002. He emphasized that Board's circular which gives clarification relating to existing law/provisions of

Notification, would apply equally to any law/notifications issued earlier if the provisions are identical. In this regard he also relied upon judgment of Mars International 2012 (286) ELT 146 (GOI) and Aarti Industries Ltd.-2012 (285) ELT 461 (GOI). Commissioner (Appeals) concluded that even though the amendment in the provisions in superseded Notification No. 84/2010-Cus. (NT) dated 17.09.2010 came in force only on 20.09.2010, the board's circular makes it clear that even if the rebate of Central Excise duty paid on raw material used in the manufacture of export goods has been taken in terms of Rule 18 of Central Excise Rules 2002 or if such raw materials were procured without payment of Central Excise Duty under Rule 19(2) of Central Excise Rules, 2002 and accordingly set aside Order in Original No. KDL/DBK/01/ADC/SS/2012-13 dated 05.03.2013 passed by the Additional Commissioner of Customs, Kandla.

5. The Commissioner of Customs, Kandla found that the Order in Appeal No. 606 to 608/2013/Cus/Commr(A)/KDL dated 02.09.2013 was not legal and proper and therefore directed the Assistant Commissioner of Customs (DBK) Customs House, Kandla to file revision application on the following grounds :

a. The respondents had availed drawback on the De Oiled cake (DOC)/Soyabean Meal (SBM) which was manufactured availing facility of Rule 19(2) of the Central Excise Rules, 2002. As per condition 7 (f) of Notification No.81/2006 Cus(NT) and 68/07 Cus (NT) and condition no 8(f) of Notf. NO.103/2008 Cus(NT):-

> *(7) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is -*
>
> *(f) manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002;*

Thus, notification denies the drawback of the entire schedule (whether Excise or Customs components), if the facility of rule 19(2) of the Central Excise 2002 is availed. **The said conditions are the prime requirement to get a commodity eligible for drawback.**

b. The Drawback was introduced to the said products vide Notf. No 84/2010, effective from 20.09.2010, as there was no such bar on availment of Drawback therein on the goods which was manufactured availing benefit of Rule 19(2) of the Central Excise Rules, 2002 in the said Notification. The respondents have filed the appeal against the said OIO before the Commissioner, Appeal, Customs, Kandla. The Commissioner (Appeal), vide said Order in Appeal, allowed the appeal contrary to the statutory provisions and settled legal positions as under:

As per Rule 5 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995:

> Rule 5: Determination of date from which the amount of rate of drawback is to come into force and the effective date for application of amount or rate of drawback.
>
> (1) The Central Government may specify the period upto which any amount or rate of drawback determined under rule 3 or revised under rule 4, as the case may be, shall be in force.
>
> (2) where the amount or rate of drawback is allowed with retrospective effect, such amount or rate shall be allowed from such date as may be specified by the Central Government by notification in the Official Gazette which shall not be, earlier than the date of changes in the rates of duty on inputs [or tax on input services] used in the export goods.

Since, in the instant case it is categorically mentioned in the Notf. No. 84/2010 Cus (NT) that the same is effective from 20.09.10, question of giving it retrospective effect does not arise as further clarified by the office of the Drawback Commissioner.vide letter dated 04.01.12.

c. The Commissioner (Appeals) has grossly erred and brushed aside and ignored all the statutory provisions, settled legal positions and even ignored the clarification dated 04.01.2012 issued by the office of the Drawback Commissioner, CBEC, New Delhi. The Commissioner (Appeal) has *suo moto* allowed the appeal by misinterpreting the circular no. 35/2010 dated 17.09.2010 of the Drawback Commissioner, CBEC, New Delhi. Though, it was categorically mentioned in the said Circular as well as in the relevant notification No. 84/2010 Cus (NT) dated 17.09.2010 that the same is effective from 20.09.2010 even though the Commissioner Appeal *suo moto* misconceived the said circular and stated in the Order-In-appeal that the said Notification No 84/2010 is effective retrospectively. The Commissioner Appeal has also ignored the clarification issued by the Drawback Commissioner dated 04.01.2012 (copy enclosed as part of appeal memorandum) wherein it is categorically clarified as under:-

> *"Since the words of the notification no. 84/2010-Cus (NT) dated 07.09.2010 are clear and have prospective effect, the request for applying the same retrospectively does not arise".*

The Constitutional Bench of the Hon'ble Apex Court in the case of Shyam Sundar Vs. Ram Kumar (Civil Appeal No. 4680/1993) has held that "we have quoted both the provisions in juxtaposition to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is a well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectively. The aforesaid principle has full play when vested rights are affected or influenced in the absence

of any unequivocal expose; the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet that routinely or conventionally retrospective operation of law is not to be easily deduced. Hypothecation in that regard is ordinarily unwarranted."

Since, in this case it is categorically mentioned in the said Notf. No. 84/2010 and relevant circular no 35/2010 dated 17.09.10 that the same is effective from 20.09.2010, any question to make effective the same retrospectively does not arise.

d. On merit of the admissibility of Drawback also the Hon'ble Supreme Court in the case of Rubfila International Ltd. vs. Commissioner reported in 2008 (224) E.L.T. A133. (S.C.)] upheld the decision of the Tribunal wherein it was held :

> *"The Appellate Tribunal in its impugned order had held that even though All Industry Rate was fixed for a particular export product, applicable to all exporters who export the products, when there is evidence that inputs had not suffered any duty, mischief of Rule 3(1) (ii) of Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 was attracted and no drawback can be claimed.*

The order of the Hon'ble Apex Court is applicable in this case also as no duty was suffered on any of the inputs/raw material used in the manufacture of export goods (DOC).

e. The Hon'ble Supreme Court in the case of Commissioner of Central Excise, Chandigarh-1 Versus Mahaan Dairies reporter) in 2004 (166) E.L.T. 23 (S.C.) has held as under :-

> *"It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred "*

f. The Hon'ble Delhi High Court in the case of M/s. Sesame Foods Pvt. Ltd. vs. UOI reported in 2010 (253) ELT 167 (Del.) denied the drawback and even questioned the applicability of all Industry Rate as under (Para 28):

> *"The very concept of a "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty, either excise or customs duty. If agricultural inputs that are in fact not imported, do not otherwise suffer incidence of excise duty, the question of fixing an AIR for such commodity cannot arise. The parity sought with HSD is plainly misconceived as HSD is a non-agricultural commodity which is manufactured and otherwise is amenable to levy of excise duties. This fundamental difference was perhaps lost sight of when the Respondents proceeded to fix AIR for sesame seeds. The only manner in which the petitioner could have got the benefit was to show that the sesame seeds were in fact imported. That explains why it repeatedly assured*

the Respondents that it would provide proof to this effect. And it failed to do so."

The said judgment of the High Court is squarely applicable in this case as no input has suffered any customs or central excise duty and therefore allowing of All India Rate of Drawback appears not allowable on the said product.

g. In a similar case of availment of drawback in the case of M/s. Sterling Agro Industries Ltd., the **Government of India in order no. 214-215/10- Cus dtd.06.07.2910** have upheld the order of the Commissioner (Appeal) as under :-

"15. In view of above discussion and findings, government, finds that the applicant by way of procuring duty free inputs under rule 19(2) of Central Excise Rules, 2002 has contravened the clause (ii) of the Second Proviso to rule 3(1) of the Central Excise Drawback Rule, 1995 (Also Condition 7(f) of Notification No. 68/2007-Cus (NT) and Condition No.8(f) of Notification No. 103/2008-Cus. (NT) and therefore no drawback is admissible in this case. As such, Government finds no infirmity in the impugned orders and upholds the same.

The said Party had filed Writ Petition No 5894/2011 against the said order before the Division Bench of the honorable M.P High Court Gwalior Bench which remanded the said order of the Govt. of India and held that the Drawback be admissible under Rule 3(1) of the Drawback Rules if the benefit from payment of duty or rebate or Cenvat has been reversed. Thus, the stand of simultaneous availment of Drawback and Rule 19(2) cannot exist in light of the lid order of the High Court.

In the instant case the situation is more worst as no duty (Customs or Central Excise) has been paid on any of the Inputs hence no drawback will be admissible as per 2nd proviso to Rule 3 of the Drawback Rules as held by the Honorable Delhi High Court in the case of Seasame Foods and the Tribunal in the case of Rubfila International which was affirmed by the Honorable Supreme Court as cited above.

Thus, it is crystal clear that the Commissioner, Customs (Appeals), Kandla has grossly erred in the impugned order in appeal by ignoring all the above statutory provisions of Rule 5 of the DBK Rules above and settled legal position as well as the clarification of tile drawback Commissioner dated 04.01.12 hence is liable to be set aside to meet the justice.

h. The judgments quoted in para 7 of the said OIA viz Mars International reported at 2012 (286) ELT 146 (G.O.I) and Aarti Industries Ltd. reported at 2012 (285) ELT 461 (G.O.I) have been issued only after Notification No. 84/2010-Cus. (NT) dated 17.09.2010 which came in force only on 20.09.2010 as the instant case had occurred before issuance of Notification No. 84/2010- Cus. (NT) dated

17.09.2010 (effective from 20.09.2012). Hence quoting such judgments will have no importance in the instant case.

i. Besides these, the said fraudulent availment of drawback had also been pointed out by the C & AG and appeared in PAC Audit Report No. 15/2011-12 in Para 2.3.12

In view of the aforesaid submissions, applicant department pleaded that Order in Appeal No. 606 to 608/Commr(A)/KDL/2013 dated 02.09.2013 passed by the Commissioner of Customs(Appeals), Kandla in the cases of (1) M/s Narayan Trading Co. (A Unit of Narayan Niryat India Pvt. Ltd . Indore (M.P.), (respondent No. 1), (2) M/s. Ambika Solvex Ltd., Indore, (M.P.) (respondent No. 2) and (3) Shri Kailash Chandra Garg (respondent No. 3) be set aside and Order in Original No. KDL/DBK/01/ADC/SS/2012-13 dated 05.03.2013 passed by the Additional Commissioner of Customs, Kandla be upheld.

6. Personal hearing in these cases was held on 15.01.2021 which was attended online on behalf of the applicant department by Shri Prashant Kumar Mishra, Supdt (DBK), Custom House Kandla. He reiterated the submissions dated 07.01.2021. Shri Jaydeep C. Patel, Advocate, also appeared online on behalf of the respondents and submitted that Revision Application is barred by limitation of time. He further stated that the Show Cause Notice was issued by DGCEI who are not authorized to issue Show Cause Notice for drawback. He further submitted that Annexure to Show Cause Notice clearly mentions that Goods procured under Rule 19(2) of the Central Excise Rules, were mostly duty paid.

7. The applicant department in its submission reiterated the following points :-

7.1 The Order in Appeal No. 244/Commr (A)/CusilM14/ 2013 dated 25.03.2013 of the Commissioner of Customs (Appeals), Kandla at Ahmedabad is not legal and proper as the Notification No. 84/2010-Customs (NT) dated 17.09.2010 is prospective. Therefore, before this date, Notification No. 103/2008-Cus(NT) dated 29.08.2008 was in force; which provided that the rates of drawback in the drawback schedule would not be applicable to products manufactured or exported by availing the rebate of central excise duty paid on materials used in the manufacture of export goods in terms of rule 18 of the Central Excise Rules, 2002, or if such raw materials were procured without payment of Central Excise duty under rule 19(2) of the Central Excise Rules, 2002. In view of the above, the drawback claim amount is to be denied for the export made before 20.09.2010 in the present claim. The supporting case laws are as under:

(a) Hon'ble Apex Court in the case of Shyam Sunday vs. Ram Kumar (Civil Appeal No. 4680/1993)

(b) Hon'ble Supreme Court in the case of Rubfila International Ltd. vs.. Commissioner in 2008 (224) E.L.T A133 (SC)

(c) Honble Supreme Court in the case of Commissioner of Central Excise, Chandigarh-1 versus Mahaan Dairies in 2004 (166) E.L.T. 23 (SC)

(d) Hon'ble Delhi High Court in the case of M/s Sesame Foods Pvt. Ltd. vs 1.301 in 2010 (253) ELT 167 (Del.)

7.2 In similar cases, Hon'ble High Court of M.P. at Indore has passed the judgment in favor of the department in writ petition No. 2576/2012 filed by M/s Suraj Impex, Indore.

7.3 Case of the department is covered in its favor by Order No. 231/2013- Cus dated 04.10.2013 by Joint Secretary(RA), CBEC, New Delhi in an identical legal and factual matrix in case of M/s Rama Phosphate Ltd.

In view of the above, it is most respectfully submitted that the impugned order passed by the Commissioner of Customs (Appeals), Kandla at Ahmedabad is illegal, improper, unjust, unacceptable and untenable and therefore, merits to be set aside.

8. During the personal hearing held earlier before the Revisionary Authority Shri Jaydeep C. Patel, Advocate had filed written submissions contending therein as under:-

8.1 The Revision Application is barred by time having been filed after the expiry of three months from the date of communication of the Order-in-Appeal. It is seen from Form C.A.-8 that the Order-in-Appeal dated 2-9-2013 was communicated to the Applicant on 10.9.2013. The Form C.A-8 is signed on 12-2-2014 which itself is beyond three months from 10.9.2013. The Application is obviously therefore filed much beyond the period of three months from 10.9.2013. On this ground alone the Application is liable to be rejected.

The following submissions are made without prejudice to this preliminary submission of time-bar.

8.2 Joint Director, DGCEI was not 'proper officer' to issue Notice demanding Drawback under Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules 1995:

Rule 16 provides for demand to be made by "proper officer" of customs. The expression "proper officer" is defined in Section 2(34) of the Customs Act 1962 to mean the officer of customs, who in relation to any function, is assigned that function by the Board or the Commissioner. It is submitted that the Officers of DGCEI have at no time been assigned the function under Rule 16 as proper officers by the Board or Commissioner. Accordingly the Notice dated 28-3-2011 issued under Rule 16 by the Joint Director, DGCEI was without jurisdiction since he was

not the proper officer for the purpose of Rule 16. Reliance is placed in this behalf on the following decisions

Hemchand Gupta & Sons v CC — 2015 (330) ELT 161 –

Monte International v CC- 2016 (340) ELT 345.

Since the Show Cause Notice dated 28-3-2011 was issued without jurisdiction, no demand for drawback can be confirmed.

The following submissions are made without prejudice to the aforesaid submissions.

8.3 No evidence to show that Hexane used in the manufacture of the export goods was procured without payment of duty:

In his statement dated 11-6-2010, Sanjay Kapoor of Ambika Solvex Ltd. has stated that their factories at Patharia and Champla Khedi used only duty paid Hexane to manufacture the said goods. The factory at Jaora had in 2006-07 and 2007-08 used duty paid Hexane as well as Hexane procured without payment of duty under Rule 19(2) of the Central Excise Rules 1944. In the years 2008-09 to 2010-11 the said factory at Jaora had used only duty paid Hexane. There is no evidence produced by the department to establish that to manufacture the goods exported by Narayan Trading Company, Ambika Solvex Ltd. had used Hexane procured without payment of duty under Rule 19(2). In fact a bare perusal of Annexure A to the Show Cause notice shows that even as per the Notice, in respect of most of the exports Duty paid Hexane was used. Consequently, the question of demanding drawback on the ground that non-duty paid Hexane was used does not arise.

8.4 In any event, assuming while denying, that Hexane used to manufacture the export goods was received without payment of Central Excise duty, even so, since the entire 1% drawback was only customs component, it is irrelevant that Central Excise duty was not allegedly paid on the Hexane:

Sr. No.23 of Notification No.81/2006-Cus (NT) dated 13-7-2006 and Notification No. 68/2007-Cus (NT) dated 16-7-2007 prescribed 1% Drawback both under Column A (when Cenvat facility has not been availed) as well as Column B (when Cenvat facility has been availed). Condition 5 of the said Notifications provides that where the rate indicated in both the columns is same, it shall mean that same pertains to only customs component and is available irrespective of whether the exporter has availed Cenvat or not. Thus, the 1% drawback rate pertained to only customs components.

8.5 It is submitted that when the 1% drawback paid to the exporter is only customs component, it becomes irrelevant whether Hexane was received on payment of Central Excise duty or not. This is because the drawback is not of Central Excise duty and therefore it is immaterial whether Central Excise duty was

paid or not on the raw material/ input. Since the drawback is only of the customs component and not of Central Excise duty, the same cannot be denied on the ground that the input was allegedly received without payment of Central Excise duty. This aspect has been examined at length and decided in the exporter's favour by the Government of India in its decision in Blackstone Overseas P. Ltd v CCE - 2016 (7) TMI 805-GOI. This decision of the Government of India has also considered the period prior to 2010 when Notification No.103/2008-Cus (NT) was in issue and applied to the said period the clarification of the CBEC contained in Circular No.35/2010 dated 17-9-2010. Therefore the ground raised in the department's Revision Application that the said Circular does not apply to the period prior to 2010 is clearly not tenable in law. The said decision in Blackstone Overseas P. Ltd v CCE — 2016 (7) TM1 805-G0I is the latest decision of 2016. The following decisions of the Government of India also support the Respondents' case:

In Re: Benny Impex P. Ltd — 2003 (154) ELT 300 (GOI)

In Re: Mars International — 2012 (286) ELT 146 (GOI)

In Re: Aarti Industries Ltd — 2012 (285) ELT 461 (GOI).

8.6 In any event, Section 114 and Section 114AA of the Customs Act 1962 have no application:

Without prejudice to the aforesaid submissions, in any event, it is submitted that the provisions of Section 113 (ii), Section 114 and Section 114AA of the Customs Act 1962 have no application to the facts of the present case. There is no allegation of any misdeclaration of the export goods. The export goods had been correctly declared. Section 113(ii) has no application to case of export under claim for drawback at all industry rate. The said Section 113(H) applies in cases of providing incorrect information for fixation of rate of drawback under Section 75 i.e. Cases of fixation of Brand rate of drawback. The present case is not one of fixation of rate of drawback. Therefore Section 113(ii) has no application and consequently Section 114 also does not apply. Section 114AA also has no application. There is no evidence that the Respondents had knowingly or intentionally made, used, signed or caused to be made, used or signed any false or incorrect declaration or document. There is no evidence of any such knowledge or intention on the part of Mr. Kailash Chandra Garg. Neither was his statement recorded nor has any one implicated him nor is there any evidence of any such knowledge or intention on his part.

9. Government has carefully gone through the relevant case records and perused the order-in-original, order-in-appeal and written submissions filed by both the applicant department and on behalf of the respondent company.

9.1 As regards the contention of the respondent that in the instant case the Revision Application is barred by time having been filed beyond the period of three

months from the date of communication of Order in Appeal, Government observes from the records resting in files that the Office of the Commissioner of Customs, Kandla had in fact filed the Revision applications against OIA No. 606 to 608/2013/Cus/Commr(A)/ KDL dated 02.09.2013 passed by the Commissioner (Appeals), Customs, Kandla in respect of M/s Ambika Solvex Ltd. & others vide letter F.No. S/20-88/DBK-SCN/2011 dated 04.12.2013 signed by the Assistant Commissioner (DBK) Customs House, Kandla. These Revision Applications were duly received in the office of the Joint Secretary (RA), Ministry of Finance, Department of Revenue, (Revision Application Unit), New Delhi on 09.12.2013 (as seen from the Department of Revenue's stamp and initials of the staff both bearing the date 09.12.2013). The department along with its aforesaid letter dated 04.12.2013 and other related documents, filed these Revision Applications in duly filled CA-5 form signed on 04.12.2013 by the Assistant Commissioner (DBK), Custom House, Kandla. On verification of the said Revision Applications in due course, the office of the Joint Secretary (RA), New Delhi observed that the department filed these Revision Applications in C.A. 5 Form (applicable for filing appeals before Tribunal) instead of C.A. 8 Form and vide letter dated 03.02.2014 asked the department to file these applications in C.A. 8 forms. In reply to RA office, New Delhi's letter dated 03.02.2014 the Assistant Commissioner (DBK), Custom House, Kandla vide its letter F.No. S/20-88/DBK-SCN/2011 dated 12.02.2014 submitted C.A. 8 Forms to the office of the Joint Secretary (RA), New Delhi in respect of each respondent which were received in the said office on 18.02.2014. On receipt of these C.A.8 Forms which also bore signature and date (12.02.2014) of the Assistant Commissioner (DBK), Custom House, Kandla, as per prevalent practice *"Show Cause Notice Issued under Section 129 DD of the of the Customs Act"* were forwarded to all the three respondents. From the foregoing discussions as well as from the checklist available in the file it is proved beyond doubt that on receipt of impugned Order in Appeal on 10.09.2013, the applicant department has filed the Revision Applications in these 3 cases on 09.12.2013 which is within initial period of three months prescribed under Section 129DD(2) of the Customs Act, 1962 and hence not barred by limitation as claimed by the respondent.

9.2 The respondent further submitted that Joint Director, DGCEI was not 'proper officer' to issue Notice demanding Drawback under Rule 16 of the Customs, Central Excise and Service Tax Drawback Rules 1995 and therefore, the Show Cause Notice dated 28-3-2011 issued under Rule 16 by the Joint Director, DGCEI was without jurisdiction since he was not the proper officer for the purpose of Rule. Government observes that this objection raised by the respondent is that show cause notice dated 28.03.2011 has been issued by Joint Director, DGCEI who is not a 'proper officer' in terms of Section 2(34) read with Sections 17 and 28 of the Customs Act, 1962 and therefore, the show cause notice is without jurisdiction and no demand for drawback can be confirmed. They rely on judgment of the Hemchand Gupta & Sons v CC - 2015 (330) ELT 161 and Monte International v CC-2016 (340) ELT 345.

9.2.1 Government observes that the definition/terminology of 'proper officer' became a subject matter of litigation before Hon'ble Supreme Courts and High Courts and in order to appreciate the said issue it would be necessary to deal with the chronological events interpreting the term 'proper officer' and the various powers to be exercised by such officers under the various provisions of the Customs Act, 1962 by the various Courts.

- Hon'ble Supreme Court in "Commissioner of Customs v. Sayed Ali, (2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.)" quashed and set aside show cause notices issued prior to 8-4-2011 inter alia by Additional Director General, Directorate of Revenue Intelligence, in Writ Jurisdiction. The decision of the Hon'ble Delhi High Court in Mangali Impex Limited [2016 (335) E.L.T. 605 (Del.)] as well as the decision of the Hon'ble Supreme Court in the case of Commissioner of Customs v. Sayed Ali - (2011) 3 SCC 537 = 2011 (265) E.L.T. 17 (S.C.) have dealt with the powers of DRI / DGCEI as well as Commissioner of Customs (Preventive) for demanding customs duty under Section 28 of the Customs Act, 1975. These cases have dealt with the provisions of Section 28 as it stood prior to 8-4-2011.
- Hon'ble Apex Court in the case of Commissioner of Customs vs. Sayed Ali, 2011 (265) 17 (S.C.) held that the DRI officers were not proper officers in terms of section 2(34) of the Customs Act, 1962. After the declaration of law by the Hon'ble Supreme Court (supra), the provisions of section 28 of the

Customs Act, 1962 were amended with effect from 08.04.2011 vide Finance Act, 2011 and Notification No. 44/2011-Cus (NT), dated July 6, 2011 was issued by the CBEC, assigning the functions of the proper officer to various officers of DRI/DGCEI etc. mentioned in the notification, for the purposes of Section 17 & 28 of the Act. Thus, w.e.f. July 6, 2011, the Additional Director General/Additional Directors or Joint Directors, Deputy Directors or Assistant Directors of DRI/DGCEI were appointed as 'proper officer' for the purpose of Section 17 & 28 of the Customs Act. Hence, from 06-07-2011 the aforementioned officers of DRI/DGCEI have been empowered to issue demand notice under Section 28.

- Subsequently, sub-Section (11) was inserted under Section 28 of the Customs (Amendment and Validation) Act, 2011 dated 16-09-2011, assigning the functions of proper officers to various DRI/DGCEI officers with retrospective effect. The validity of this newly enacted Section 28(11) of Customs Act was further challenged in many cases.

- The Hon'ble Bombay High Court in the case of Sunil Gupta Vs UOI decided on 03-01-2014, reported in 2015 (315) ELT 167 (Bom.), distinguished the Apex Court judgment in Sayed Ali case(supra), noting that provisions of Customs Act have undergone a change after the said judgment. The Hon'ble Bombay High Court rejected the challenge to the new sub-section (11) of Section 28 ibid. (paras 23, 24 & 25 of the said Judgment dated 03.01.2014 refer).

- Hon'ble Delhi High Court in Mangali Impex Ltd. Vs UOI [2016 (335) EL 605 (Del.)], took a contrary view , inter alia, holding that newly inserted Section 28 (11) does not empower officers of DRI and DGCEI to either proceed to adjudicate SCNs already issued by them for period prior to 08.04.2011 or to issue SCNs for period prior to 08.04.2011. The Delhi High Court placed reliance on Sayed Ali case (supra).

- The High Court of Telangana and Andhra Pradesh, vide judgement dated 26-10-2016, in the case of Vuppalamritha Magnetic Components Ltd. Vs DRI (Zonal Unit), Chennai, reported in 2017 (345) ELT 161 (AP), dissented from the view taken by the Hon'ble Delhi High Court in the Mangali Impex judgement-and took a contrary view inter alia as under :

"10. At the outset, we are of the considered view that the writ petition is not maintainable. The show cause notice dated 30-7-2009, which is under challenge in the present writ petition, is no longer in force. The show cause notice has already culminated in a order of adjudication and the order of adjudication has also been confirmed by the Tribunal, the High Court and the Supreme Court. The doctrine of merger has come into play and the show cause notice is not available any more for the petitioner to challenge.

11. Heavily reliance is placed by Mr. P. Vikram, learned counsel for the petitioner on two things viz., (1) the judgment of the Delhi High Court in Mangali Impex Ltd., (supra); and (2) the judgment of a Division Bench of the Punjab & Haryana High Court in Rajinder Arora and Others v. Union of India and Others [2016 (339) E.L.T. 370 (P & H)]. In Mangali Impex Ltd., (supra), the Division Bench of the Delhi High Court set aside even the show cause notices, despite the fact that the show cause notices had already culminated in orders of finality. In Rajinder Arora and Others v. Union of India and Others (1 supra), a Division Bench of the Punjab & Haryana High Court also dealt with a case where the show cause notice had culminated in a order of adjudication, but it was the subject matter of an appeal before the Tribunal. The Punjab & Haryana High Court held that in the light of the decision of the Supreme Court in Sayed Ali and in the light of the decision of the Delhi High Court in Mangali Impex Ltd., the show cause notice, the adjudication order as well as the consequential recovery proceedings were non est and void ab initio.

12. But unfortunately, the Delhi High Court as well as the Punjab & Haryana High Court have not considered the issue from the point of view of merger. It is needless to point out that the doctrine of merger is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. The underlying principle behind the doctrine of merger is that there cannot be more than one decree.

13. The issue can be looked at from another aspect also. Today, the effect of our allowing the writ petition and setting aside the show cause notice would be to set at naught, the order of adjudication, the judgment of CESTAT, the judgment of this Court and the order of Supreme Court. What cannot be achieved by the petitioner directly cannot be achieved by them indirectly.

14. The contention that all proceedings founded upon a show cause notice that was inherently lacking in jurisdiction, would be non est, null and void, is perhaps right as a simple statement of a proposition of law. But it is not without exceptions. If this theory of nullity and voidity is accepted, all proceedings initiated before 8-4-2011, which have already culminated in orders of adjudication and pursuant to which recoveries have been made, are also to be deemed as non est. Therefore, the Commissionerates of Excise throughout the country can today be flooded with applications for refund of the duty paid in pursuance of the orders of adjudication passed on the basis of such show cause notices. The theory of nullity and voidity cannot be extended to such an extent as to lead to such disastrous consequences.

15. There is also one more aspect. It is not the case of the petitioner that they challenged either the impugned show cause notice or the Order-in-Original at the

relevant point of time on the ground that the show cause notice was issued by a person not assigned the role of a proper officer. The petitioner had challenged the show cause notice and the order of adjudication on other grounds, which stand rejected up to Supreme Court. Therefore, the principle of finality to litigation would put a seal on the present attempt on the part of the petitioner to reopen the issue all over again."

9.2.2 There being conflicting decisions of various High Courts (Supra) on the issue, the matter finally reached the Hon'ble Supreme Court which has granted stay on the Mangali Impex judgment (supra) vide its order dated 1-8-2016, as reported in 2016 (339) E.L.T. A49 (S.C.). Therefore, finality in the matter will be arrived at only after the Hon'ble Supreme Court gives its verdict in the said case. In such an event, as ruled by the Hon'ble Apex Court in UOI v. West Coast Paper Mills Ltd. - 2004 (164) E.L.T. 375 (S.C.), once the appeal having been filed and entertained by the Supreme Court, the judgment of a High Court is in jeopardy. Relevant portions of that judgment are reproduced below:

"14. Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal.

... ...

38. In the aforementioned cases, this Court failed to take into consideration that once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit."

9.2.3 It is pertinent to mention here that CBEC vide Instruction dated 03.01.2017 issued under F.No.276/104/2016-CX.8A (Pt.) specifically directed all the Field formations under Customs, Central Excise and Service Tax that

2. In this regard, I am directed to say that the Board inter alia, had referred the issue of pending adjudications of cases covered by the above said Board Instruction to the Ld. Solicitor General of India. The Ld. Solicitor General has opined, inter alia, that in view of the unconditional stay in force, granted by the

Hon'ble Supreme Court, the Department could continue with adjudication of the Show Cause Notices hitherto covered by the Mangali Impex judgment.

Further, vide subsequent Instructions issued under F.No.276/104/2016-CX.8A (Pt.) dated 03.09.2019, CBIC informed all the field formations under Central Tax and Customs that

References have been received in the Board regarding the adjudication of cases wherein the Show Cause notices issued by DRI, DGCEI, SIIB, Preventive etc. pertaining to the duty demand prior to 08.04.2011 were kept in Call book, in light of the order dated 03.05.2016 of the Hon'ble Delhi High Court in the case of M/s Mangali Impex.

2. In this regard, the Department has filed SLP (C) No. 20453/2016 (now Civil Appeal No. 6142/2019) and vide order dated 01.08.2016, Hon'ble Supreme Court granted stay on the order dated 03.05.2016 of Hon'ble Delhi High Court. Accordingly, in light of the opinion of Ld. Solicitor General of India that there is no bar on the adjudication of such cases, Board vide Instruction of even no. dated 03.01.2017 (copy available on CBIC website) directed the field formations to adjudicate the cases, which were kept in the Callbook, in accordance with law. Further, Member (Customs) vide D.O.F. No. 437/143/2009-CusIV-pt.II dated 06.01.21017 directed the field formations to draw up an action plan for adjudications of these cases in a time bound manner.

3. Accordingly, it is reiterated that the earlier Board Instruction of even no. dated 03.01.2017 may be scrupulously followed, and the adjudication proceedings may be completed expeditiously, in accordance with law.

9.2.4 In view of foregoing discussions as well as relying on Hon'ble Bombay High Court (jurisdictional High Court) in the judgement in the case of Sunil Gupta Vs UOI (Supra) and Hon'ble High Court of Telangana, Andhra Pradesh, judgement in the case of Vuppalamritha Magnetic Components Ltd. Vs DRI (Zonal Unit) (supra) as well as Board's instruction dated 03.01.2017 and 03.09.2019, the respondent's contention that Show cause notice dated 28.03.2011 by the Joint Director, DGCEI was without jurisdiction is not tenable and Government proceeds to decide these Revision Applications on merit.

10. Government observes that the short issue in all these revision applications is whether duty drawback @ 1% of FOB value is admissible to the exporter respondent on the exports of DOC & SBM under Rule 3(1) of the Drawback Rules read with the provisions of Notification No. 81/2006-Cus(NT) dated 13.07.2006, 68/2007-Cus(NT) dated 16.07.2007 and 103/2008-Cus(NT) dated 29.08.2008.

11. It is observed that the detailed investigation has established that the manufacturers had procured duty free hexane by availing the facility under Rule 19(2) of the CER, 2002 and used the same for the manufacture of DOC and sold the same to respondent no. 1 during the period between 2006-07 to 2009-10. Government takes note that the second proviso to Rule 3 of the Drawback Rules at clause (ii) thereof bars drawback if goods are produced or manufactured using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid. Similarly condition no. 7(f) of Notification No. 81/2006-Cus(NT), 68/2007-Cus(NT) and condition no. 8(f) of Notification No. 103/2008-Cus(NT) provide that the rates of drawback specified in the schedule shall not be applicable to export of a commodity or product if such product is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. Thus it is apparent that the All Industry Rates of Drawback specified under the schedule annexed to the notifications are not applicable to the exporter of such goods if the goods have been manufactured with inputs on which duty has not been paid and have been procured by availing the facility under Rule 19(2) of the CER, 2002. The inference that can be drawn from the condition in the notifications and Rule 3 of the Drawback Rules is that duty should necessarily have been suffered on the inputs used in the export product. This is also the settled legal position. The duty element on the inputs is the primary ingredient for deciding the admissibility of drawback on exports. With regard to the inferences drawn by the Commissioner(Appeals) in the impugned order based on CBEC Circular No. 35/2010-Cus dated 17.09.2010, it is apparent from the text of the circular that the clarification regarding drawback in a situation where the raw materials have been procured without payment of central excise duty under Rule 19(2) of the CER, 2002 has been specifically stated to be admissible only with reference to Notification No. 84/2010-Cus(NT) dated 17.09.2010. It is pertinent to note that the portion where the issue has been raised in clause (d) of para 4(vi) of the circular, the notification

mentioned is Notification No. 103/2008-Cus(NT) dated 29.08.2008. However, the notifications determining AIR rate of drawback for the preceding periods do not find mention in the portion where the reference has been answered and only Notification No. 84/2010-Cus(NT) dated 17.09.2010 finds mention. Therefore, it is obvious that the clarification issued by the Board applies only to Notification No. 84/2010-Cus(NT) dated 17.09.2010 which is applicable from 20.09.2010. The issue has been settled beyond doubt by the clarification issued by the Office of the Drawback Commissioner vide his letter F. No. 609/292/2008-DBK dated 04.01.2012 to the Federation of Indian Export Organization.

12. Government finds that the respondents have claimed that there is no evidence to show that the Hexane used in the manufacture of the export goods was procured without payment of duty and that Annexure A to the Show cause Notice shows that even as per Notice, in respect of most of the exports Duty paid Hexane was used and as a consequence, question of demanding drawback on the ground that non duty paid Hexane was used does not arise.

12.1 Government observes that it is clearly mentioned at para 9.2 of the Show Cause Notice dated 28.03.2011 that *'It also appears that the De-Oiled Cake manufactured by availing benefit of Rule 19(2) of CER,2002 were exported by the said Noticee no. 1 during the year 2006-07 to 2009-10* by claiming Drawback @ 1% of FOB. *Though the Noticee No.1, in the chart submitted by them has shown manufacture of certain quantity of DOC using duty paid hexane by M/s Ambika Solvex Ltd., but the same was used in the process with the Hexane procured without payment of duty.....* Hence, it is apparent that the chart submitted by the Noticee No. 1 (Respondent No.1 in the present case) has been used as Annexure A to Show cause Notice to show the quantification of the allegedly irregular availment of Drawback by the respondent No.1. Moreover, the investigations carried out by the DGCEI have revealed (para 9.1 of the Show cause Notice dated 28.03.2011) as under:-

> *The Noticee No 1 has attempted to give the wrong information in the details submitted by them in respect of DOC exported by them in 2008-09 and 2009-10 which was purchased from the manufacturer viz.- M/s Ambika Solvex; Jaora, Kalapeepal and Akola in as much as they have shown purchase of most of the quantity of DOC from M/s Ambika Solvex, Jaora in 2008-09 and 2009-10 and claimed the same being manufactured using duty paid hexane. Their attempt exposed in light of the details of*

sale submitted by M/s Ambika Solvex Ltd., vide their letter dated 17.06.2010 which reflect that the said DOC has actually been purchased by them from M/s Ambika Solvex, Kalapeepal and Akola plant in 2008-09 and 2009-10 which have manufactured the same using hexane procured without payment of C. Ex. Duty under rule 19(2) of C. Ex. Rules,2002 and on the basis of documents and statement of the relevant manufacturer discussed In foregoing paragraph above, it appears that the said noticee no.1 had exported the said DOC availing facility of Duty Draw Back during 2006-07 to 2009-10 which was purchased by them from the manufacturer viz. Mis Ambika Solvex, Jaora Kalapeepal and Akola which have manufactured the same at the relevant time using hexane procured without payment of C. Ex. Duty under rule 19(2) of C. Ex. Rules,2002. To suppress this fact from the Customs and Central Excise Authorities at port, the manufacturer M/s Ambika Solvex, Jaora,Kalapeepal and Akola which have manufactured the said DOC under bond availing facility of Rule 19(2) of the Central Excise Rules,2002 by procuring Food Grade Hexane without payment of duty from petroleum companies by following the procedure prescribed under Notification No. 43/2001-CE(NT) dated 26.06.2001, as amended and Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 and used such Food Grade Hexane, procured without payment of Central Excise duty in the manufacture of De-Oiled Cake (which were purchased and subsequently exported by the Noticee no.1 under claim of Drawback); have not issued ARE-2 for removal of the said DOC and have issued only the export invoices at the time of removal of the said DOC from their premises and also not submitted the ARE 2 to the Customs authorities at port while claiming Drawback.

12.2 Assuming for a moment that there is any merit in the submission of the respondents that it has not been proved by the investigation that only non-duty paid inputs were used in the manufacturing process, it is observed from the statement of Shri Sanjay Kapoor, Head of the Department (Accounts) of M/s Ambika Solvex Ltd. that he has admitted to using of common pipelines and common storage facility for hexane used in the manufacture of DOC. Government finds that the categorical stipulation of the respective notifications allowing drawback is that the rates of drawback shall not be applicable to the export of a commodity or product if it is manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. The notifications allowing drawback do not leave any scope for interpretation of the degrees/percentages in which materials could be used in the manufacture. Since the pipelines and storage facility are common, the respondents are no longer in a position to claim that duty paid inputs were used for manufacture. Once any material procured under sub-rule (2) of Rule 19 of the CER, 2002 is used for manufacture, the manufacturer is disentitled from the benefit of drawback. Convenient interpretation which does not emanate from the text of the

notification cannot be inserted into it. The text of the notification is sacrosanct and any attempt to add words to or deduct words therefrom would be unacceptable.

13. Government takes note of the judgments of the courts on the issue. In the case of Rubfila International Ltd. vs. Commissioner[2008(224)ELT A133(SC)], the Apex court upheld the principle that when there is evidence that the inputs had not suffered duty, the mischief of Rule 3(1)(ii) of the Drawback Rules would be attracted and no drawback can be claimed. So also, in the case of Sesame Foods Pvt. Ltd. vs. UOI[2010(253)ELT 167(Del)], their Lordships held that "drawback" presupposes that it is preceded by a transaction that has suffered some incidence of duty and if goods like agricultural inputs are not imported and do not suffer incidence of excise duty, the question of fixing AIR for such commodities cannot arise. In the case of Suraj Impex (India) Pvt. Ltd. vs. Secretary, Union of India[2017(347)ELT 252(M.P.)], the Hon'ble High Court of Madhya Pradesh held that simultaneous availment of drawback as well as Rule 19(2) was introduced by omission of clause 8(f) of the erstwhile Notification No. 103/2008 and the introduction of new clause 9(b) in Notification No. 84/2010 which was made effective from 20.09.2010 and explained the same in Circular No. 35/2010. The Notification No. 84/2010 was effective from 20.09.2010 and the same cannot be given retrospective effect in the light of the aforementioned facts.

14. Government observes that in the case of Anandeya Zinc Oxides Pvt. Ltd.[2016(337)ELT 354(Bom.)], the Hon'ble Bombay High Court had occasion to examine the argument put forth by that manufacturer that drawback of customs portion could be availed alongwith facility for procurement of inputs under Rule 19(2) of the CER, 2002. The Hon'ble Bombay High Court found that the view taken by the authorities below that the petitioners in that case could not avail customs drawback under Notification No. 26/2003-Cus(NT) dated 01.04.2003 could not be faulted. It was further held that there was no scope for bifurcating drawback towards customs and excise allocation. Their Lordships noted that the notification clearly provides an exclusion to the applicability of the entire notification in specific situations which have been specified therein; one of which was - goods manufactured or exported in terms of sub-rule (2) of Rule 19 of the CER, 2002. The Hon'ble High Court opined that nothing could be read into such notification and that it was well settled that taxation and fiscal statutes have to be strictly

construed. Their Lordships firmly held that the Courts cannot read words into such provisos. The judgments of the Apex Court and the High Courts are binding precedents. The case laws which have been relied upon by the respondents do not consider these judgments and in some cases pertain to the period after 20.09.2010. In view of the foregoing the respondent's argument that "*since entire 1% drawback was only customs component, it is irrelevant that Central Excise duty was not allegedly paid on the Hexane*" is not legally tenable. Government notes that the findings In Re : Aarti Industries Ltd.[2012(285)ELT461(GOI)] and GOI Order No.36-38/2016-CX dated 22.02.2016 in M/s Blackstone Overseas Pvt. Ltd.. are based on the interpretation of the amplitude of Notification No. 84/2010-Cus(NT) dated 17.09.2010 which has been explained in the CBEC Circular No. 35/2010-Cus dated 17.09.2010. These findings are misplaced and erroneous. Be that as it may, these order are not the final position of law on this issue in so far as decisions in the judicial realm are concerned and therefore are not a binding precedent. Therefore, Government concludes that AIR drawback is not admissible to the respondent no. 1 and the drawback sanctioned and paid to the said respondent is liable to be recovered alongwith interest.

15.1 Government proceeds to consider the case for imposition of penalty on the exporter (respondent No.1), Director of the exporter (respondent No.3) and the manufacturer (respondent No.2) who have supplied DOC to the exporter. The manufacturers have not issued ARE-2 for removal of the DOC but have only issued export invoices while clearing multiple consignments of goods over a period of a few years. The non-issue of ARE-2 was clearly not a mistake as borne out by the fact that the DGCEI has booked cases against several manufacturers and exporters who had adopted the same practice of not issuing ARE-2's. Besides the manufacturers/exporter involved in this case, there are other cases booked by the DGCEI which involve identical facts and involve several other manufacturers/exporters. Such failure in not issuing the ARE-2's cannot be passed off as a coincidence. Remarkably in all the cases booked by the DGCEI, the export goods were cleared from Kandla Port and Bedi Port in Gujarat and the same were manufactured by manufacturers located in Madhya Pradesh. One would have to be extremely naive to be convinced that such repetitive failures in issuing ARE-2's and misdeclaration in Appendix-I/III's are legitimate coincidences. It cannot be lost

sight of that in matters of revenue, preponderance of probability is the standard for evaluating the existence of a fact and not proof beyond doubt.

15.2 Government places reliance upon the judgment of the Hon'ble Madras High Court in the case of Lawn Textile Mills Pvt. Ltd. vs. CESTAT, Chennai[2018(362)ELT 559(Mad)] wherein it was held that clandestine removal with intention to evade payment of duty is always done in a secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in such cases where secrecy is involved, there would be cases where direct documentary evidence is not available. However, if the Department is able to establish a case on the basis of seized records, then the allegation of clandestine removal must be held to be proved. Adopting the ratio of the said judgment to the facts of the present case, the records have established that the respondent No. 1 has availed drawback on export goods inspite of them having been manufactured using inputs which had been procured without payment of duty under Rule 19(2) of the CER, 2002. The virtually identical circumstances of ARE-2's not having been issued by the manufacturer, M/s Ambika Solvex Ltd. (respondent No.2) in the present case and by several manufacturers in all the cases booked by the DGCEI are by themselves are corroboratory evidence of complicity with the exporters. It cannot be mere coincidence that the outcome of this so called failure on the part of the manufacturers in all these cases has by default resulted in the exporters opportunely obtaining drawback which would otherwise have been rejected by the customs authorities.

15.3 Government therefore infers that the procedure adopted by the manufacturer in not issuing ARE-2 was meant for the exporter to claim ignorance of the fact that inputs had been procured by availing the facility of Rule 19(2) of the CER, 2002 and claim drawback. The fact that this practice was adopted by several manufacturers/exporters is a pointer to the adoption of this modus to enable exporters to claim drawback where the manufacturers had availed the facility under Rule 19(2) of the CER, 2002 to procure inputs. To name a few Government has come across identical issues in Revision Applications 1. 380/75,85,65,76,64/DBK/2014 M/s Oswal Salt & Chemical Industries & others (GOI Order No. 145-149/2020 dtd. 27.08.2020, 2. 380/66,74,80,83/DBK/2014 in Re: M/s Laxmi Ventures (I) Ltd. & others (GOI Order No.162-165/2020

dtd.01.09.2020), 3. 380/70,79,84/DBK/2014 in Re:M/s Rainbow Agri Industries Ltd. and others (GOI Order No. 166-168/2020 dtd. 01.09.2020), 4. 380/43,45,50,51,54, 55/DBK/2014 in Re:M/s Ruchi Soya Industries Ltd. Indore (MP) and others (GOI Order No.190-195/2020 dtd.11.09.2020) and 5. 380/61-63/DBK/2013 RA- Re :- M/s Adani Enterprises Ltd. & Others (GOI Order No.206-208/2020 dated 15.09.2020).

15.4 Government is therefore of the view that the respondent no. 1 as well as the manufacturer M/s Ambika Solvex Ltd. (respondent No.2) have rendered themselves liable to be penalized. In Re: Rama Phosphate Ltd.[2014(313)ELT 838(GOI)], the Government had arrived at the conclusion that the manufacturer could not be penalized as there was no documentary evidence. The Government finds that the very fact that all the manufacturers involved in these cases had not issued ARE-2 and the practice has been commonly adopted by all of them evidences the fact that there was some sort of an arrangement between the manufacturers and the exporters to enable the exporter to avail drawback. Government therefore holds that the manufacturer and the exporter are liable to be penalized.

16.1 Government now proceeds to discuss the statutory provisions under which penalties have been imposed. In this case, the tone and tenor of the actions of the exporter and the manufacturer reveal that it was a well thought out ruse to avail drawback. There were several manufacturers and exporters against whom cases were booked by the DGCEI involving an identical modus. In all these cases raw materials had been procured without payment of duty under Rule 19(2) of the CER, 2002, ARE-2 had not been issued and thereafter drawback was claimed. The respondent no. 1 had suppressed the facts that the Export goods (DOC) has been manufactured availing the benefit of Rule 19(2) of CER, 2002 from the department, also made a false declaration in the Drawback Declaration (Appendix-I) stating that "the Export goods have not been manufactured availing facility of Rule 18/Rule 19 of the Central Excise Rules, 2002". It is implausible to even visualize that there were errors or mistakes by oversight in all these declarations. As such the respondents had rendered the goods liable for confiscation by misdeclaring that they had not availed the facility under Rule 19 of the CER, 2002 and by availing drawback on the exports. However, since the goods had been exported, the show cause notice does not propose confiscation. The fact that there is no proposal to

confiscate the goods or that the goods were not available for confiscation would not prevent penalty from being imposed on them. In this regard, Government places reliance upon the judgment in the case of Dadha Pharma Pvt. Ltd. vs. Secretary to the Government of India [2000(126)ELT 535(Mad)] which has interpreted the words "liable to confiscation" occurring in Section 112 of the Customs Act, 1962 and concluded that the power to adjudicate upon for imposition of penalty springs from the liability to confiscate and not from actual confiscation. The same analogy would apply to the provisions of Section 114 of the Customs Act, 1962. That is to say, if the goods were liable to confiscation by virtue of any action/inaction on the part of the exporter of the goods, the exporter would be liable to be penalized. Even if the goods are not available for confiscation, the penal provisions would still be invokable. There were very well thought out motives behind the actions of the respondents. There was common intention behind the false/incorrect declarations to avail drawback which would otherwise not be available. Hence, penalty under Section 114 and Section 114AA were correctly imposable on the respondents.

16.2 In so far as imposition of penalty on respondent no. 3 viz, Shri Kailash Chandra Garg, the Director of the Company (respondent No.1), Government observes that he was overall in charge of all the export related work including availment of drawback at the relevant period. Government finds that the decision to avail drawback in respect of DOC procured from the manufacturer who has not issued ARE-2's in respect of several consignments exported over a period of a few years and thereby enabled the exporter to avail drawback would undoubtedly be a conscious decision taken with the knowledge of the Director of the company. In the circumstances, Government finds that the penalty for exporting goods whose particulars do not correspond with information furnished by the exporter and for filing false declaration imposed on Shri Kailash Chandra Garg, the Director of the Company (respondent No.1), would suffice to meet the ends of justice.

17. Government therefore modifies the impugned Order in Appeal No. 606 to 608/Commr(A)/KDL/2013 dated 02.09.2013 passed by the Commissioner of Customs(Appeals), Kandla by restoring the Order in Original No. KDL/DBK/01/ADC/SS/2012-13 dated 05.03.2013 passed by the Additional Commissioner (DBK), Custom House, Kandla.

18. The revision applications Nos.380/107/DBK/13-RA, 380/108/DBK/13-RA and 380/109/DBK/13-RA filed by the Commissioner of Customs, Custom House, Kandla, are allowed in the above terms.

Shrawan 8/03/2021

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

ORDER No.57-58/2021-CX (WZ) /ASRA/Mumbai DATED 08.03.2021

To,

Principal Commissioner of Customs,
Kandla Custom House, Near Balaji Temple,
Kandla-370 210.

Copy to:

1. M/s Narayan Trading Company,
   303, Satyageeta Apartment,
   90/47, Sneh Nagar, Main Road, Indore, (M.P.) 452001.

2. M/s Ambika Solvex Ltd.,
   304, Satygeeta Appartment, 90/47, Sneh Nagar, Main Road,
   Indore, (M.P.) 452001.

3. Shri Kailash Chandra Garg,
   Director, M/s Narayan Trading Company,
   303, Satyageeta Apartment,90/47, Sneh Nagar, Main Road, Indore, (M.P.)
   452001.
4. The Commissioner of Customs, Ahmedabad Appeals, 7th Floor, Mrudul Tower, off Ashram Road, Near Times of India, Navrangpura, Ahmedabad-380 009

5. Assistant Commissioner (DBK), Custom House, Kandla, New Customs Building, Near Balaji Temple, Kandla 370 210

6. Sr. P.S. to AS (RA), Mumbai

7. Guard file.

8. Spare Copy.