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
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Mumbai- 400 005

F NO. 198/07/14-RA /5538 Date of Issue: 02.10.2020

ORDER NO. 643 /2020-CX (WZ) /ASRA/MUMBAI DATED 15.09.2020 OF THE GOVERNMENT OF INDIA PASSED BY SMT SEEMA ARORA, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF CENTRAL EXCISE ACT,1944.

Applicant : Commissioner, Central Excise & Customs, Rajkot.

Respondent : M/s Welspun Trading Limited, Kutch, Gujarat.

Subject : Revision Application filed, under Section 35EE of Central Excise Act, 1944 against the Order-in-Appeal No. 518/2013(RAJ)CE/AK/ Commr(A) / Ahd dated 08.11.2013 passed by the Commissioner (Appeals-I), Central Excise, Rajkot.

ORDER

This Revision Application has been filed by the Commissioner, Central Excise & Customs, Rajkot (hereinafter referred to as the "applicant") against the Order-in-Appeal No. 518/2013(RAJ)CE/AK/ Commr(A) / Ahd dated 08.11.2013 passed by the Commissioner (Appeals-I), Central Excise, Rajkot.

2. The brief facts of the case is that M/s. Welspun Trading Limited, Village-Varsamedi. Taluka-Anjar (hereinafter referred to as the 'respondent') are the merchant exporters of the goods produced by M/s. Welspun Gujarat Stahl Rehron Ltd., who are operating under Notification No.39/2001-CE dated 31.07.2001, as amended. At the time of clearance of the goods meant for export, the manufacturer i.e. M/s. Welspun Gujarat Stahl Rehron Ltd. had paid the amount of Central Excise duty from their PLA Account and as per the mechanism envisaged under the Notification No.39/2001- CE dated 31.07.2001, as amended, had taken the re-credit of the same in their PLA account in subsequent month. Consequent to completion of export, the said party filed various rebate claims with the Assistant Commissioner, Central Excise, Gandhidham who vide his below mentioned orders decided the rebate claims.

TABLE

Sl. No.	Rebate Order No. and date	Amount of rebate claimed	Amount deducted being re- credit taken by the manufacturer	Amount held sanctionable	Net rebate paid consequent to difference of FOB/ARE-1 Value
1	2	3	4	5	6
1.	1636/07-08 /01.11.2007	6,57,65,308/-	5,79,95,374/-	77,69,934/-	75,57,902/-
2	1637/07-08 / 01.11.2007	4,14,80,278/-	3,34,88,208/-	79,92,070/-	78,91,001/-
3	1638/07-08 / 01.11.2007	13,66,49,096/-	3,55,91,224/-	10,10,57,872/-	9,28,28,855/-
4	1639/07-08 / 01.11.2007	6,76,48,316/-	4,58,993/-	6,71,89,323/-	6,34,98,509/-
5	1640/07-08 / 01.11.2007	11,27,54,410/-	2,56,94,012/-	8,70,60,397/-	8,57,58,094/-
	TOTAL	42,42,97,408/-	15,32,27,811/-	27,10,69,596/-	25,75,34,360/-

3. As the Adjudicating Authority had sanctioned a claim of Rs.25,75,34,360/- against the amount of Rebate claimed by the respondent of Rs. 27,10,69,596/-the respondent vide letter dated 10.03.2008, made a representation to the Adjudicating Authority regarding deduction of their rebate claim on account of difference in FOB value and the ARE-1 value and requested him to review his order and grant the balance rebate due to them. The Adjudicating Authority informed the respondent vide letter No.V/10-107/Rebate/08-09 dated 30.01.2009 that the rebate orders under reference were final and no balance was kept pending and further advised the respondent to file appeal against the order already passed therein.

4. Being aggrieved with the aforesaid reply dated 30.01.2009, the respondent filed appeal before the Appellate Authority challenging the said letter No.V/10-107/Rebate/08-09 dated 30.01.2009. However, the said appeal was held as time barred and thus, the Appellate Authority rejected the appeal vide Order in Appeal No.351(318-RAJ)/2009 dated 02.04.2009 issued from F.No.V.2/84/Raj/2009. The respondent challenged the matter before High Court of Gujarat, Ahmedabad, which restored their appeal before Commissioner (Appeals) and directed the Appellate Authority to decide the appeal on merits. Accordingly, the Appellate Authority has passed this impugned order dated 08.11.2013 allowing the appeal of the respondent.

5. Being aggrieved with the impugned Order-in-Appeal, the applicant department has filed this Revision Application mainly on the following grounds :

5.1 The issue decided by the appellate authority in para 2.1 of the Order is whether the rebate is required to be granted on the value declared in ARE-1 or on FOB value of Export. While deciding the issue, the Commissioner (A) has relied upon the CBEC Circular No.510/06/2000-CX dated 03.02.2000 and Circular No.203/37/96-CX dated 26.04.1996. Further it is noticed that the Commissioner (A) has placed reliance upon the case laws in the case of Jewel Packaging P. Ltd. v/s CCE, Bhavnagar, reported in 2010 (253)ELT-622 (Tri.Ahd) and in the case of M/s. Sterlite Industries (I) Ltd. v/s CCE, Tirunelveli reported in 2009(236) ELT-143 (Tri.Chennai).

5.2 The above cited case laws are not relevant to this case in as much as the same are relying on Circulars dated 26.04.1996 and dated 03.02.2000 which were issued prior to the introduction of the concept of transaction value under Section 4(A) of the Central Excise Act,1944. Factually, in this case, the applicable excise duty has been paid at the time of clearance of the excisable goods on the basis of Invoice/ARE-1.

Subsequently, at the time of export of the same goods, the FOB Value (Shipping Bill value) was lower than the invoice value due to fluctuation in the exchange rate. Hence, the question now for the purpose of granting rebate by cash is which value should be considered i.e. ARE-1 value or FOB Value. Admittedly, in this case the rebate claim was filed on the basis of Invoice value which was higher and the overseas buyer has paid the amount as per FOB Value. The Central Excise duty is liable to be paid on transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944, w.e.f. 01.07.2000. Thus, in this case, the Central Excise Duty is required to be paid as per FOB Value which factually has been paid by the overseas buyer to the exporter and is to be treated as transaction value under Section 4 of the Central Excise Act, 1944. Therefore, any excess amount of central excise duty paid on the invoice value at the time of clearance of the goods is required to be refunded to the party in the manner in which it was paid as held by the Government in the case of Sri Bhagirath Textiles Ltd. reported in 2006(202) ELT-147 (GOI) which is exactly applicable to the facts and circumstances of the present case. The excess payment of Central Excise Duty is to be treated as voluntary deposit and not as payment of excise duty which is held by the Government in the case of Panacea Biotech Ltd. reported in 2012 (276) ELT-412 (GOI), which is described herein later. Likewise, in case of Cadila Healthcare Ltd. reported in 2013(2880LT-133 (GOI) it has been held as under :-

" 13. In view of above discussion, Government observes that original authority and appellate authority have rightly restricted the rebate Calm to the extent of duty paid @ 4% in terms of Notification No. 4/2006-C.E., dated 1-3-2006, on the FOB value which is determined in these cases as transa:tion value in terms of Section 4 of Central Excise Act, 1944. The amount of duty paid in excess of duty payable at effective rate of 4% as per Notification No.4/2006- C.E. on the transaction value of exported goods, is to be treated as voluntary deposit made by applicant with the Government. In such cases where duty is paid in excess of duty actually payable as held by Hon'ble Apex Court in the case discussed in para 9.7.2 and also held by Hon'ble High Court of Punjab and Haryana as discussed in para 9.7.3 above, the excess paid amount is to be returned/adjusted in Cenvat credit account of assessee. Moreover Government cannot retain the said amount paid without any authority of law. Therefore, the lower authorities have rightly allowed the re-credit of said excess paid amount of duty in their Cenvat credit account."

Also, in case of Panacea Biotech Ltd. reported in 2012 (276) ELT-412 (GOI), while deciding the rebate amount and manner of rebate, it is held by the Government as under :-

"11. Govt. is therefore, of the considered opinion that the rebate in cash is admissible only on the duty paid on the transaction value of the goods as determined under Section 4 of the Central Excise Act and not in the excess amount paid on differential value not forming part of transaction value. However, Government permits the applicant to take re-credit in cenvat credit account of the excess amount/deposit which was paid as Central Excise Duty erroneously on the goods exported by the applicant. Government accordingly, sets aside the impugned order-in-appeal and upholds the order-in-original."

In light of the above case laws, it is noticed that the reliance placed by the appellate authority while passing the subject OIA is not only wrong but also misplaced.

5.3 The rebate sanctioning authority has properly sanctioned the cash refund to the tune of excise duty applicable on the transaction value i.e. FOB value (Shipping Bill value] which is lower in this case than the Invoice Value/ARE-1 value. Further, the Government in the case of Panacea Biotech Ltd and also in the case of Cadila Healthcare Ltd. (supra) has held that CBEC Circulars issued prior to the introduction of transaction value cannot be strictly applied after 01.07.2000. Therefore, the reliance placed by the Appellate authority on the CBEC Circulars dated 03.02.2000 and dated 26.04.1996 in the subject OIA dated 08.11.2013 is not proper and justified.

6. In their reply to show cause notice issued under Section 35EE of the Central Excise Act,1944, the respondent mainly contended that :-

6.1 At the outset the instant revision application is not maintainable as no there is authorization to file the same. The impugned Order being order passed by the Ld. Commissioner of Central Excise (Appeals), Rajkot, who is a higher officer, cannot be challenged by the Deputy Commissioner of Central Excise, who has filed the instant application. It is submitted that the entire revision application does not disclose that proper authorization has been obtained by the Appellant herein to file the instant application. Consequently, the instant application be dismissed for this reason as well. Without prejudice to this submission, however, they are is making the following submissions in support of the impugned Order.

6.2 They are merchant exporters of the goods produced by M/s. Welspun Gujarat Stahl Rohren Limited, (hereinafter referred to as M/s Welspun Gujarat). M/s Welspun Gujarat are operating under Central Excise Notification No. 39/2001-CE dated 31.07.2001, as amended from time to time (hereinafter referred to as the said notification). Under the said notification an exemption from Excise Duty actually paid on the goods except for the amount of duty paid by utilization of CENVAT credit was granted to all new units set up in Kutch District.

6.3 At the time of clearance of the goods meant for export, the manufacturer i.e. M/s Welspun Gujarat has paid the amount of Central Excise duty from their P.L.A. account and as per the mechanism envisaged under the said Notification, have taken the re-credit of the same in their P.L.A. account in subsequent month. Consequent to completion of export, they filed various rebate claims with the Assistant Commissioner, Central Excise, Gandhidham decided the rebate claims sanctioning claim of Rs. 25,75,34,360/- as against the amount claimed by them of Rs. 27,10,69,596/- under the Rebate Order No. 1636/2007-08 to 1640/2007-08 all dated 01.11.2007.

6.4 The reason for this rejection was the difference between FOB value and ARE-1 Value due to currency fluctuation. In most of the cases, during the relevant period the exchange rate in rupee per dollar was prevailing at Rs, 44.30/- at the time of dispatch of goods from the factory, which came down to Rs. 40.55/- at the time of actual shipment of goods. Due to the said fluctuation in the foreign exchange rate there was a loss in the excise duty to the tune of Rs.1,75,62,279/- and gain of Rs.40,27,071/-. Thus, total difference of Rs. 1,35,35,208/- was disallowed by the jurisdictional Assistant Commissioner while passing the rebate claim.

6.5 After considering the submissions made by them while deciding the appeal filed by them on merits as per directions of Hon'ble High Court Gujarat, the Ld. Commissioner (Appeals) has by way of the impugned Order dated 21.10.2013 held that a similar issue was also decided by the Hon'ble CESTAT in the case of M/s. Jewel Packaging Pvt. Ltd. Vs. CCE, Bhavnagar reported in 2010 (253) ELT 622 (Tri-Ahmd.) wherein it was held that the re-quantification of rebate amount is not permissible on basis of some other exchange rate subsequent to date on which duty paid. He has further placed reliance on the judgment in the case of M/s. Sterlite Industries (1) Ltd. Vs. CCE Tirunelveli reported in 2009 (236) ELT 143 (Tri-Chen), wherein it was held that an exporter is entitled to rebate of entire duty of excise paid by it on clearance of goods for export and claim of rebate cannot be denied on the ground that rebate is admissible only on duty on FOB value and not on CIF value as long as same represents its 'transaction value'.

6.6 In light of the above case-laws, the Ld. Commissioner (Appeals) has held that there is no reason to restrict the rebate to the extent of FOB value, as has been done by the lower Adjudicating Authority and allowed their appeal. Aggrieved by the said Order in Appeal dated 31.10.2013, the Central Excise Department preferred the instant Revision Application.

6.7 The only issue involved in the present case is as whether the rebate is to be sanctioned on the basis of Invoice Value i.e. assessable value at which the goods are cleared from the factory of the Appellant or on the basis of FOB value of the goods. In this respect it is expedient to examine the

relevant legal provisions in relation to rebate of duty in case of export. Rebate of excise duty is granted under Rule 18 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') which reads as follows:-

Rule 18. Rebate of duty.— Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification. Explanation. "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

[Emphasis Supplied]

Thus, as per the above stated provision, the Central Government may, by notification, grant rebate of duty paid in relation to the excisable goods. In this regard the Central Government has issued a Notification No. 19/2004-CE (NT) dated 6-9-2004 which provides a procedure for rebate of duty for exports to countries other than Nepal and Bhutan. By way of this Notification the Central Government directs that there shall be granted rebate of the whole of the duty paid on all excisable goods falling under the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), [hereinafter referred to as the Tariff Act'] exported to any country other than Nepal and Bhutan, subject to the conditions, limitations and procedures specified therein.

As it can be seen, the emphasis is on the words 'duty paid on all excisable goods'. Further, 'duty' is defined under Explanation-I to Notification No. 19/2004-CE (NT) dated 6-9-2004 as follows:-

Explanation I. - "duty" for the purpose of this notification means duties of excise collected under the following enactments, namely:

(a) the Central Excise Act, 1944 (1 of 1944);

(b) the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957);

(c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978);

(d) the National Calamity Contingent duty leviable under section 136 of the Finance Act, 2001 (14 of 2001), as amended by section 169 of the Finance Act, 2003 (32 of 2003) and further amended by section 3 of the Finance Act, 2004 (13 of 2004)

(e) special excise duty collected under a Finance Act;

(f) additional duty of excise as levied under section 157' of the Finance Act, 2003 (32 of 2003);

(g) Education Cess on excisable goods as levied under clause 81 read with clause 83 of the Finance (No. 2) Bill, 2004. [

Emphasis Supplied]

In view of the above, it is clear that as per the above notification', rebate of excise duty 'paid' on goods exported by an assessee has to be granted. Neither the said notification nor Rule 18 of the Rules provides that the rebate of excise duty shall be granted on either 'Invoice Value' or 'FOB Value'. Admittedly in the present case, they have claimed benefit of only excise duty actually paid by them in relation to the goods exported by them. The entire duty paid in relation to the goods exported by an assessee is correctly refundable.

6.8 In this regard reliance is also placed on Circular No. 510/06/2000-CX, dated 03.02.2000, issued by the Central Board of Excise & Customs (CBEC) which provides that rebate has to be allowed equivalent to the duty paid on the exported goods. It is also clarified in the said circular 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.

Similarly, in CBEC Circular No. 203/37/96-CX, dated 26-4-1996 the Board has clarified that it is not necessary that the 'AR4 Value' and the 'FOB Value' should be the same.

In view of the above, it is clear that as per the scheme of rebate as formulated by the Government under Rule 18 read with Notification No. 1912004-C.E. (N. T.), dated 6-9-2004 that whatever duty is paid by an assessee in relation to export goods shall be liable to be refunded. Admittedly, in the present case the excise duty claimed for refund has actually been deposited by the assessee and the entire duty paid in relation to the exported goods must be allowed to the rebated.

6.9 In this regard reliance is placed on the judgment in the case of M/s Jewel Packaging (supra), wherein it was held that 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.

Reliance is also placed in this regard on the judgment of Sterlite Industries (I) Ltd.(supra) wherein issue related to rebate of duty paid on supplementary invoices raised by foreign buyer on finalization of provisional values and duty amount paid was not reflected in the ARE-Is as the supplementary invoices were raised subsequent to exports. In that case, rebate of said duty paid on supplementary invoices was allowed by Joint Secretary, since transaction value was revised subsequently and the said claim was filed within one year from the date of export. Relevant part of the judgment is extracted below for the sake of clarity:-

As per the Circular No. 510/06/2000-CX, dt. 3-2-2000 issued by the CBEC, the rebate sanctioning authority should examine only the admissibility of rebate of the duty paid on the export of goods covered by a rebate claim and should not examine the correctness of assessment of the goods cleared for export. As per the same Circular, where the assessee makes good short payment' of any amount of duty prior to sanction of rebate, the assessee should be allowed rebate of the full amount of duty paid on the goods exported provided the rebate for the entire duty paid is claimed within the limitation period. Notification No. 19/04-C.E. issued to implement the incentive scheme as per Rule 18 of the CER prescribes that there shall be granted rebate of the whole of the duty paid on excisable goods on their export. The lower authority ordered recovery of rebate allowed to the extent of Rs. 4,50,13,457/- on the basis that the appellants had claimed rebate of duty paid on the CIF value instead of FOB value of each of the consignment covered. We find that an exporter is entitled to rebate of the entire duty of excise paid on a consignment of excisable goods on its export. There is no dispute that the appellants paid the impugned amount as part of the duty of excise on consignments exported and covered by ARE-1s. A claim for the said amount cannot be denied on the ground that rebate is admissible only on the duty on the FOB value and not on the CIF value as long as the same represents the transaction value. In the instant case, there is no dispute that the entire amount of Rs. 16,10,23,430/- including the impugned amount of Rs. 4,50,13,457/- under supplementary invoices had been paid by the assessee as excise duty on the transaction value of the goods. There is also no dispute that the export consignments had suffered the differential duty on the value shown in the connected supplementary invoices raised on the foreign buyer. The Commissioner rejected the claim for rebate of this differential duty to the tune of Rs. 4,50,13,457/- on the ground that the appellants had claimed rebate on the CIF value of the export goods. That the ARE1 did not show the additional duty paid on the consignment subsequently cannot also be a reason to deny rebate of part of the duty paid later as per the contract with the assessee's buyer. The exporter is entitled to rebate of the entire duty of excise paid by it on clearance of goods for export. The impugned order seeking recovery of a part of the admissible rebate is inconsistent with the legal provisions. The same is set aside. The appeal is allowed."

[Emphasis Supplied]

Reliance in this regard is also placed on the judgment in the case of CCE, Bangalore v. Maini Precision Products Pvt. Ltd. reported at 2010 (252) ELT. 409 (Tri. - Bang.) wherein the assessee had paid duty on the basis of CIF value instead of FOB value and claimed higher refund. In this case, it was held that rebate sanctioning authority should not examine the correctness of assessment but should examine only the admissibility of rebate of the duty paid on goods covered by a claim.

6.10 In view of the above Board Circulars as well as the case laws, it is clear that entire amount of duty paid in relation to exported goods are to be refunded even when the goods are not assessed correctly as per the provisions of the Act. The rebate sanctioning authorities cannot examine the assessment of the goods, and only the admissibility of the rebate claim is to be examined. In the present case, no dispute has been raised on the admissibility of the refund claim and thus entire rebate claim must be allowed. The present Revision Application is thus liable to be dismissed.

6.11 The law to this regard is now well settled that Circulars issued by the Board are binding on the Department and a contrary view cannot be taken by the Departmental officers. Reliance is placed inter alia upon the following decisions in support of this submission;

➢ Commissioner of Central Excise, Mumbai v. Raj Purohit GMP India Ltd. 2008 (231) ELT 577 (SC)

➢ Union of India v. Arviva Industries Ltd. 2007 (209) ELT 5 (SC)

➢ Saci Allied Products Ltd. v. Commissioner of Central Excise, Meerut 2005 (183) ELT 225 (SC)

➢ Paper Products Ltd. v. CCE 1999 (112) ELT 765 (SC)

➢ N.G. Enterprises v. CCE 2002 (144) ELT 512 (Del)

➢Haryana Acrylic Mfg. Co. P Ltd. v. CC 2002 (144) ELT 503 (Del)

➢ Delhi Acrylic Mfg. Co. Ltd. v. CC 2002 (144) ELT 24 (Del).

6.12 It is therefore submitted that the Ld. Commissioner (Appeals) correctly followed the legal position by applying the Board Circulars and there is no infirmity in the approach to grant rebate claim on such ground.

6.13 It is further submitted that the Appellant department is wrong to contend in the instant Application that both the abovementioned Circulars dated 03.02.2000 and 26.04.1996 as well as the case laws cited by them placing reliance on these circulars are not relevant due to the introduction of the concept of `transaction value' under Section 4 of the Central Excise Act, 1944 (hereinafter referred to as `the Act'). It is humbly submitted that the said submission is misleading and incorrect. The above Circulars clearly provide that entire rebate amount is to be sanctioned irrespective of the method of valuation. Thus, whether the goods have been assessed under erstwhile Section 4 of the Act (i.e. as per the normal wholesale price) or as per the `transaction value' is irrelevant as per the above circulars as the Rebate sanctioning authority is not entitled to delve into the correctness of the assessment. Thus, the ground of the Appellant Department in the Revision Application that the Circulars dated 03.02.2000 and 26.04.1996 are not applicable after the

introduction of the concept of 'transaction value' is unsustainable. Further, it is also pertinent to note that the aforesaid circulars have not been withdrawn by the department and Circulars are valid as of today. It is only obvious that if there was any change in the legal position the Board would have withdrawn the Circular which is otherwise binding on the Departmental officers. The fact that the said Circulars have not been withdrawn clearly reflects that the Board of is of the opinion that the said Circulars represent the correct legal position and therefore have to be applied without fail and benefit accruing thereunder has to be extended to them.

6.14 Further, in the present case, admittedly, the applicable excise duty has been paid at the time of clearance of the excisable goods on the basis of Invoice / ARE-I. There can be no dispute that said duty has been paid as per the prevailing 'transaction value' at the time and place of removal of goods. Though after the clearance of goods, at the time of export, FOB Value (Shipping Bill Value) was lower than the invoice value due to fluctuation in the exchange rate. However, undisputedly they have have paid duty on the basis of 'transaction value' as defined under Section 4(1)(d) of the Act. Thus, they are entitled for refund of entire excise duty paid at the time of clearance of goods as per the 'transaction value'.

6.15 In view of the above submissions, it is humbly submitted that they are entitled for the refund of entire duty paid at the time of clearance of goods from the factory in view of the binding circulars issued by CBEC.

6.16 Further, the Appellant Department in the present Revision Application has placed reliance on the judgment in the case of Cadila Healthcare (supra) and Pannacea Biotech (supra). It is humbly submitted that ratio of the judgment in the cases of Cadila Healthcare (supra) and Pannacea Biotech (supra) is not applicable to the present case.

In the case of Cadila Healthcare (supra), the goods namely pharmaceuticals / medicaments were cleared by assessee for home consumption by paying duty at lower rate of 4% claiming exemption under Notification No. 4/2006- C.E. However, the duty in case of export goods was paid at a higher rate of 10% (as per the tariff rate). The Tribunal in such case observed that the excess duty was paid with an intention to pay such higher duty through Cenvat credit and thus get higher rebate at 10% thereof on export. In such case, this lion'ble Authority held that such excess duty paid voluntarily is not liable to be refunded. Thus, the said judgment was rendered in a scenario where the excess duty was paid by the assessee with an intention to gain extra rebate.

Similarly, in the case of Pannacea Biotech (supra), it was held the rebate in cash is admissible only on the duty paid on the transaction value of the goods as determined under Section 4 of the Central Excise Act, and not in the excess amount paid on differential value not forming part of

transaction value. In the said case less duty was realized by the assessee, than the same mentioned in the excise invoice.

In the present case, there is no dispute that duty has been paid as per the 'transaction value' as defined in Section 4(1)(d) of the Act and there is no extra payment or under realization of invoice amount. The difference between the FOB value and Invoice Value is only due to currency fluctuation. Both the above judgments are rendered in light of the peculiar factual circumstances and not at all applicable in the present case. Thus, the above judgments are distinguishable on facts as well as law and reliance on these judgments is misplaced.

6.17 Without prejudice to the submissions made above that entire duty paid at the time of clearance of goods is liable to be refunded, it is humbly submitted that in any case any excess duty paid by them must be treated as excess duty paid to the department and they are entitled to get a refund of excess duty paid as per the provisions of Section 11 B of the Act.

In this regard, reliance is placed on the judgment of Punjab & Haryana High Court in the case of Ws. Nahar Industrial Enterprises Ltd. v. U01 - 2009 (235) ELT 22 (P&H) wherein assessee had paid duty on export goods at tariff rate of 16% ignoring the exemption Notification No. 29/2004-C.E. and 30/2004-C.E. both dated 9-7-2004 prescribing duty @ 4% and nil respectively. Hon'ble High Court has held that though the assessee is not entitled to rebate of any excess duty voluntarily paid however, allowed recredit of balance amount in the Cenvat credit account of assessee.

Similarly in the judgment of Sri Bhagirth Textiles Ltd. reported at 2006 (202) E.L.T. 147 (G.O.I.), this Hon'ble Authority has held that any excess duty paid by the assessee must be refunded in the manner in which it was paid by the assessee:-

It is therefore submitted that there is no authority under the provisions of the Central Excise Act, 1944 to retain the amount which was erroneously paid by the assessee.

6.18 It is further submitted even in terms of the constitutional stipulations the amount is liable to be returned to them, which has been rightly so done by the Ld. Commissioner (Appeals). It is submitted that Article 265 of the Constitution of India prescribes that no tax shall be levied or collected without the authority of law. Thus in as much as the amount of duty paid by them has been notified to be refunded by way of rebate, in terms of the relevant statutory rule and the statutory notification to this effect as stated above, the retention of the amount by the Department and denial of rebate is violation of the constitution stipulation and thus cannot be countenanced by this Hon'ble Authority.

6.19 In view of the above submissions, it is clear that they are entitled for rebate of entire duty paid at the time of removal of goods for export. However, without prejudice to the above; in case Hon'ble Revisionary Authority is of the view that due to lesser amount realized by the assessee due to currency fluctuation, they are not entitled for rebate on the entire amount, then they must be allowed to take self-credit of excess amount paid at the time of clearance of goods.

8. A Personal Hearing in this matter was held on 22.01.2020. Shri Dinesh Kalantri, Vice President, Indirect Tax and Shri Jitendra Motwani, Advocate appeared for the said hearing on behalf of the respondent company and reiterated written submissions made earlier in reply to show cause notice and also submitted that in this case rebate was restricted to the FOB value which was contested by them with the case laws. They relied upon GOI Order In: Re Marol Overseas Limited. [2014(314)E.L.T. 983 (G.O.I.)]. They also submitted compilation of relied upon Provisions of related law /Notifications/Case laws in support of their case.

9. Government has carefully gone through the relevant case records & written submissions and the impugned Order-in-Original and Order-in-Appeal. Government observes that the present Revision Application has been filed by the Deputy Commissioner, Central Excise Division Gandhidham against the impugned Order in Appeal on the basis of Direction and Authorization issued under F.No. V/2-332/OIA/RRA/2013 dated 15.01.2014 by the Commissioner, Central Excise Rajkot. Hence, the contention of the respondent that the instant revision application is not maintainable as no there is authorization to file the same, is misplaced. Government, therefore, proceeds to decide the instant Revision application on merits.

10. The issue to be decided in the instant Revision Application is whether the respondent is eligible for rebate on the value declared in ARE-1 or on FOB value of Export. On perusal of records, Government observes that the applicant Department has contended that in this case the rebate claim was filed on the basis of Invoice value which was higher and the overseas buyer has paid the amount as per FOB Value. The Central Excise duty is liable to be paid on transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944, w.e.f. 01.07.2000; thus, in this case, the Central Excise Duty is required to be paid as per FOB Value which factually has been paid by the overseas buyer to the exporter and is to be treated as transaction value under Section 4 of the Central Excise Act, 1944 and therefore, any excess

amount of central excise duty paid on the invoice value at the time of clearance of the goods is required to be refunded to the party in the manner in which it was paid as held by the Government in the case of Sri Bhagirath Textiles Ltd. reported in 2006(202) ELT-147 (GOI) which is exactly applicable to the facts and circumstances of the present case. The applicant department has further contended that the excess payment of Central Excise Duty is to be treated as voluntary deposit and not as payment of excise duty which is held by the Government in the case of Panacea Biotech Ltd. reported in 2012 (276) ELT-412 (GOI).

11. Whereas, the respondent has mainly pleaded that the applicable excise duty has been paid at the time of clearance of the excisable goods on the basis of Invoice / ARE-I as per the prevailing 'transaction value' at the time and place of removal of goods. It is further contended that though after the clearance of goods, at the time of export, FOB Value (Shipping Bill Value) was lower than the invoice value due to fluctuation in the exchange rate; that however, undisputedly they have paid duty on the basis of 'transaction value' as defined under Section 4(1)(d) of the Act and therefore, they are entitled for refund of entire excise duty paid at the time of clearance of goods as per the 'transaction value'.

12. The respondent have also relied upon GOI Order In: Re Marol Overseas Limited. [2014(314)E.L.T. 983 (G.O.I.)]. In this case the rebate claims were initially partly sanctioned to the applicant inasmuch as amount of Rs. 14,32,685/-, was denied to be rebated in the form of cash. Out of total rejected sum of Rs. 14,32,685/-, amount of Rs. 12,09,275/- was disallowed for the reasons that original/duplicate copies of AREs-1 could not be filed along with relevant proof of export.. Remaining amount of Rs. 2,23,410/- was allowed to be credited in Cenvat account of the applicant on the ground that transaction value in impugned cases is the lowest of three FOB values given in impugned AREs-1, Shipping Bills and BRCs. On appeal being filed against the Orders in Original Commissioner (Appeals) modified said Orders-in-Original inasmuch as rebate claims to the extent of Rs. 12,09,275/- held to be admissible to the applicant, however, the applicant's plea to allow rebate in cash for remaining amount of Rs. 2,23,410/- was rejected. While deciding the Revision Application filed by the applicant, GOI vide its Order No. 1-11/2013-Cx, dated 3-1-2013 observed that :

7. On perusal of records, it is observed that applicant has contested the impugned Order-in-Appeal for denial of cash rebate of Rs. 2,23,410/-. Applicant has contended that they have paid duty on the transaction value of the goods. The FOB value declared on Shipping Bill is exactly same. The difference in BRC value is due to fluctuation in foreign exchange rate and not due to any inclusion of ocean freight value. Government notes that the original authority has not given any finding/reasoning for choosing lowest of the values mentioned in AREs-1, Shipping Bills and BRCs. Such conclusion without any basis is not proper and legal. Once, port of export is not disputed as 'place of removal', and sale contract is on FOB basis there is no reason to reject the ARE-1/FOB value as transaction value.

8. Government further observes that C.B.E. & C. vide Circular No. 510/06/2000-Cx, dated 3-2-2000 has clarified that there is no question of re-quantifying the amount of rebate by applying some other rate of exchange prevalent subsequent to the date on which the duty was paid. As such, the rebate amount need not to be changed on account of lower realization in BRCs due to exchange rate fluctuation. The contention of the applicant that difference in said values is due to fluctuation in exchange rate has not been considered by lower authorities.

9. In view of above position, Government modifies orders of Commissioner (Appeals) in terms of discussions above and accordingly, remands the case back to original to verify and determine whether the difference in said values is due to foreign exchange rate fluctuation and if so, the said rebate claim will be sanctioned to the applicant in accordance with law. A reasonable opportunity of hearing will be afforded to the party.

13. In the Case of Marol Overseas Limited. [2014(314)E.L.T. 983 (G.O.I.)] discussed supra, the transaction value of the goods and the FOB value declared on Shipping Bill was exactly same. Whereas in the instant case there is a difference in Invoice/ARE-1 value and Shipping Bill value. It is pertinent to note here that the respondent in their letter dated 10.03.2008 requesting the Assistant Commissioner, Gandhidham to review his Orders in Original had not mentioned anything about currency fluctuations being the reason for the difference between FOB value and ARE-1 Value. In the instant case, FOB value declared in Shipping Bill by the respondent is lower than the value declared in ARE-1 Form. The respondent had not given any reason for difference in these two values before Adjudicating Authority. Therefore, Adjudicating Authority considered the FOB value as declared in Shipping Bill as transaction value of goods and accordingly held that duty was payable on transaction value which is FOB value in this case. Accordingly, Adjudicating Authority allowed rebate of duty payable on

lower value appearing in one of the two statutory documents namely ARE-1 and Shipping Bill.

14. Government observes that the case laws relied upon by the applicant department the rebate was restricted to rate of duty at which the applicant cleared the goods for home consumption and not at higher tariff rate at which duty was paid on exported goods (Cadila Healthcare); rebate was restricted only on the duty paid on the transaction value of the goods as determined under Section 4 of the Central Excise Act and not in the excess amount paid on differential value not forming part of transaction value (CIF Value) (Pannacea Biotech). Even in case of Sri Bhagirath Textiles Ltd. (supra) the duty was paid on CIF value and not on transaction value of the goods. However, GOI in its Order Nos. 933-1124/2012-CX., dated 31-8-2012 in Cadila Healthcare [2013 (288) E.L.T. 133 (G.O.I.)] (supra) has discussed the relevant statutory provisions for determination of value of excisable goods and the same are reproduced below :-

> **12.1** As per basic applicable Section 4(1)(a) of Central Excise Act, 1944 where duty of excise is chargeable on any excisable goods with reference to their value, then on each removal of said goods such value shall,
>
> (a) In a case where the goods are sold by the assessee, for delivery at time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.
>
> (b) In other case, including the cases where the goods are not sold by the value determined in such manner as may be prescribed.
>
> **12.2** word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows :
>
> "'Sale' and 'Purchase' with their grammatical variations and cognate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."
>
> **12.3** Place of Removal has been defined under Section 4(3)(c)(i), (ii), (iii) as :
>
> (i) A factory or any other place or premises of production of manufacture of the excisable goods;

(ii) A warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
(iii) A Depot, Premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

12.4 The Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also relevant which is reproduced below :-

"Rule 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1. - "Cost of transportation" includes -

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

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

12.5 Government observes that from the perusal of above provisions it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 1 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it cannot be beyond the port of loading of the export goods. It can be either factory, warehouse or port of export and expenses of freight/insurance incurred upto place of removal form part of assessable value. Under such circumstances, the place of removal is the port of export if sale takes place at the port of export. The GOI Order No. 271/05, dated 25-7-2005 in the case of *CCE, Nagpur* v. *M/s. Sri Bhagirth Textiles Ltd.* reported as 2006 (202) E.L.T. 147 (G.O.I.) has also held as under :-

"the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed under Section 4 of the Central Excise Act, 1944".

It is clear from the order that in any case duty is not to be paid on the CIF value.

12.6 Government observes that the respondent in their counter reply relied upon C.B.E. & C. Circular No. 510/06/2000-CX., dated 3-2-2000. In this regard, the Government observes that w.e.f. 1-7-2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act and therefore said Circular issued prior to the introduction of transaction value concept, cannot be strictly applied after 1-7-2000. As per para 3(b)(ii) of Notification No. 19/2004-C.E. (N.T.), dated 6-9-2004, the rebate sanctioning authority has to satisfy himself that rebate claim is in order before sanctioning the same. If the claim is in order he shall sanction the rebate either in whole or in part. The said para 3(b)(ii) is reproduced below :

"3(b) Presentation of claim for rebate to Central Excise :-

(i) .....

(ii) The Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise having jurisdiction over the factory of manufacture or warehouse or, as the case may be, Maritime Commissioner of Central Excise shall compare the duplicate copy of application received from the officer of customs with the original copy received from the exporter and with the triplicate copy received from the Central Excise Officer and if satisfied that the claim is in order, he shall sanction the rebate either in whole or in part."

The said provisions of this notification clearly stipulate that after examining the rebate claim, the rebate sanctioning authority will sanction the claim in whole or part as the case may be depending on facts of the case.

12.7 Government notes that said notification issued under Rule 18 of Central Excise Rules, 2002, prescribes the conditions, limitations and procedure to be following for claiming as well as sanctioning rebate claims of duty paid on exported goods. The satisfaction of rebate sanctioning authority requires that rebate claim as per the relevant statutory provisions is to be in order. He does not have the mandate to sanction claim of obviously excess paid duty and then initiate proceeding for recovery of the erroneously paid rebate claim. Therefore, the circular of 2000 as relied upon by applicant cannot supersede the provisions of Notification No. 19/2004-C.E. (N.T.). So, adjudicating authority

has rightly 'restricted and sanctioned the part rebate claim upto duty paid @ 4% on the FOB value which was determined as transaction value of goods in this case in terms of Section 4 of Central Excise Act, 1944 and also rightly held that any amount paid in excess of duty liability on one's own volition cannot be treated as duty and it has to be treated a voluntary deposit with the Government which is required to be returned to the applicants in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law.....

15. From the impugned Order in Appeal Government observes that the respondent had submitted a statement showing reasons for the difference in FOB value and Invoice Value of the goods and consequential difference in excise duty and submitted that in most of the cases exchange rate in rupee per dollar was prevailing at Rs.44.30 at the time of dispatch of goods from the factory which came down to Rs.40.55 at the time of actual shipment of goods. Relying on the submissions of the respondent and also relying on case laws mentioned in impugned Order, Commissioner (Appeals) has allowed the appeal filed by the respondent. However Government is of the considered opinion that each of such claims of the respondent needs to be verified by the original authority to determine their authenticity and veracity in order to arrive at proper transaction value in terms of relevant statutory provisions for determination of value of excisable goods, discussed supra in order to decide the rebate claims of the respondent accordingly.

16. In view of above position, Government sets aside the order Order-in-Appeal No. 518/2013 (RAJ)CE/AK/Commr(A)/ Ahd dated 08.11.2013 passed by the Commissioner (Appeals-I), Central Excise, Rajkot, and remands the case back to original Adjudicating Authority to verify and determine whether the difference in said values is due to stated foreign exchange rate fluctuation or due to inclusion of ocean freight or freight/Insurance incurred beyond port of export (CIF Value), taking into account the statutory provisions for determination of value of excisable goods, discussed at para 14 supra. A reasonable opportunity of hearing will be afforded to the respondent. If, upon fresh verification, the difference in said values of Invoices/ARE-Is and Shipping Bills is found to be exclusively on account of foreign exchange rate fluctuation and also it is established that duty on the clearance of the excisable goods for exports from factory, on the basis of Invoice / ARE-I has been paid, as per the prevailing 'transaction value' at the time and place of removal of goods from factory, the said rebate claim will be sanctioned to the applicant in accordance with law.

However, if FOB value which has been determined as transaction value of goods in this case in terms of Section 4 of Central Excise Act, 1944 is found lower than the Invoice/ARE-1 value for the reasons other than on account of foreign exchange rate fluctuation, then the duty so paid in excess of duty liability on the FOB value determined, has to be treated as duty paid on respondent's own volition and to be treated as voluntary deposit with the Government which is required to be returned to them in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. The Adjudicating Authority will decide these cases shown at Table in para 2 above, afresh in accordance with law after taking into account the above said observations within six weeks of receipt of this order.

17. Revision Application is disposed off in the above terms.

18. So, ordered.

(SEEMA ARORA)
Principal Commissioner & ex-Officio
Additional Secretary to Government of India

ORDER No. 645 /2020-CX (WZ)/ASRA/Mumbai 15.09.2020

To,
Commissioner of Central Goods & Services Tax,
Kutch (Gandhidham), GST Bhavan,
Plot No. 82, Sector-8,
Kutch (Gandhidham), Gujarat-370201

Copy to:

1. M/s Welspun Trading Limited, Welspun City, Village Versamedi, Tal. Anjar, District Kutch, Gujarat 370 110,
2. Commissioner Of Goods & Services Tax, Rajkot Appeals, 2nd Floor, GST Bhavan, Race Course, Ring Road, Rajkot-360001,
3. The Assistant Commissioner, Central Goods & Services Tax, Anjar Bhachau Division: GST Bhavan, Plot No. 82, Sector-8, Gandhidham, Gujarat-370201,
4. Sr. P.S. to AS (RA), Mumbai,
5. Guard file,
6. Spare Copy.