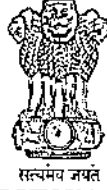


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**GOVERNMENT OF INDIA  
MINISTRY OF FINANCE  
DEPARTMENT OF REVENUE**

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

F. No. 380/83-100/DBK/WZ/2019 / 606

Date of Issue: 01.02.2023

69-86  
ORDER No. /2023-CUS (WZ) /ASRA/Mumbai DATED 30.01.2023 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.

Applicant : The Commissioner of Customs (Preventive),  
"Sarda House", Bedi Bunder Road,  
Opp. Panchwati, Jamnagar - 361008,  
GUJARAT.

Respondent : M/s Nayara Energy Limited,  
(Formerly known as M/s Essar Oil Limited)  
P.O. Box 24, Khambhaliya - 361305,  
Dist. Dev Bhumi Dwarka.

Subject : Revision Applications filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No. 01 to  
28/2012/COMMR (A)/ RBT/RAJ dated 23.01.2012  
passed by the Commissioner (Appeals), Customs &  
Central Excise, Rajkot.

**ORDER**

These Revision Applications have been filed the Commissioner of Customs (Preventive), Jamnagar (here-in-after referred to as 'the applicant'/ 'the Department') against a part of the Order-in-Appeal No. 01 to 28/2012/COMMR (A) /RBT/RAJ dated 23.01.2012 passed by the Commissioner (Appeals), Customs & Central Excise, Rajkot. The said Order-in-Appeal dated 23.01.2012 decided appeals filed M/s Nayara Energy Limited, (here-in-after referred to as 'the respondent') against 28 Orders/Letters passed by the Additional Commissioner of Central Excise (Technical), Rajkot Commissionerate. Out of the said 28 appeals filed by the respondent, the said Order-in-Appeal had allowed 18 appeals and rejected the rest 10 appeals. The applicant/Department has filed the present Revision Applications against the part of the impugned Order-in-Appeal which had allowed the 18 appeals filed by the respondent. The details of the 18 Orders/Letters issued by the Additional Commissioner which were the subject of the said 18 appeals are tabulated below:-

<b>Sr. No.</b>	<b>Order/Letter No.</b>	<b>Date</b>
1	VIII/20-50/CUS.T/2010	27.12.2010
2	VIII/20-52/CUS.T/2010	27.12.2010
3	VIII/20-51/CUS.T/2010	27.12.2010
4	VIII/20-46/CUS.T/2010	15.12.2010
5	VIII/20-47/CUS.T/2010	15.12.2010
6	VIII/20-60/CUS.T/2010	22.09.2011
7	VIII/20-61/CUS.T/2010	22.09.2011
8	VIII/20-62/CUS.T/2010	22.09.2011
9	VIII/20-64/CUS.T/2010	22.09.2011
10	VIII/20-69/CUS.T/2010	26.09.2011
11	VIII/20-71/CUS.T/2010	26.09.2011
12	VIII/20-72/CUS.T/2010	26.09.2011
13	VIII/20-78/CUS.T/2010	27.09.2011

14	VIII/20-79/CUS.T/2010	27.09.2011
15	VIII/20-80/CUS.T/2010	27.09.2011
16	VIII/20-81/CUS.T/2010	27.09.2011
17	VIII/20-83/CUS.T/2010	12/13.10.2011
18	VIII/20-85/CUS.T/2010	15.11.2011

2. Brief facts of the case are that the respondent company imported 'Crude Oil' which was used by them in the manufacture of various petroleum products which were exported by them. The respondent filed the above applications for fixation of brand rate of duty drawback under Rule 6 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (CCEDSTD Rules) on the element of National Calamity Contingent Duty (NCCD) and Cess paid by them on the said imported Crude Oil. The same were rejected by the Additional Commissioner (Tech), CCE, Rajkot on the grounds that no duty incidence on account of NCCD can be considered for computing brand rate eligibility, as NCCD was not specified for fixation of brand rate. Aggrieved, the respondent filed appeals against the said Orders'/Letters of the Additional Commissioner before the Commissioner (Appeals) who, vide the impugned Order-in-Appeal allowed 18 appeals on merits and rejected the rest of the 10 appeals.

3. Aggrieved by the portion of the impugned Order-in-Appeal dated 23.01.2012 which allowed 18 appeals of the respondent, the applicant/Department has filed the subject Revision Applications. It is submitted that they had filed an appeal against the impugned Order-in-Appeal before the Hon'ble Tribunal, and, the Tribunal vide its Order No. A/11733-11750/2019 dated 12.09.2019 had rejected their appeal as non-maintainable before it, following which they had filed the present Revision Applications. The same have been preferred on the following grounds:-

(a) The appellate authority had erred in holding that NCCD being a duty of Customs, drawback thereof was admissible to the respondent as the

drawback of Customs Duty is governed by Section 75 the Customs Act, 1962 which stipulates that, "...a drawback should be allowed of duties of customs chargeable under this Act on any imported materials... subject to, the rules made under sub-section (2)"; that the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 had been notified vide Notification No. 37/95-Cus. (N.T.) dated 26.05.1995 issued under Section 75 *ibid*; hence scope of the Drawback Rules has been restricted to the provisions contained in Section 75 and drawback could be allowed only of duties levied under the Customs Act, 1962; and since the NCCD was levied under the Finance Act, 2003, the provisions of Section 75 would not apply.

(b) Section 2 of the Customs Act, 1962 defined the term "duty" as "duty of Customs leviable under this act". Therefore, it was apparent that NCCD which was levied under Section 134 of the Finance Act, 2003, was not a duty of Customs and hence no duty incidence of NCCD could be considered for computing the brand rate of eligibility, as NCCD was not specified for fixation of brand rate.

(c) Reliance was placed on the order, passed by the CESTAT, New Delhi, in the case of Hero Honda Motors Ltd [2011 (273) ELT 89] wherein the Tribunal examined sub-section (3) of Section 136 of the Finance Act, 2001, which is *pari-materia* with sub-section (4) of Section 134 of the Finance Act, 2003 and came to a conclusion that the provisions nowhere stated that the exemption granted to the duty payable under the Central Excise Act would automatically extend to NCCD leviable under the Finance Act and that by applying the same analogy, a conclusion could be drawn that since Section 75 of the Customs Act, 1962 stipulated that drawback should be allowed of duties of Customs leviable under the Customs Act, 1962 and as NCCD was being levied under the Finance Act, 2003, and not under the Customs Act, 1962, the respondent would not be entitled to the benefit of drawback on the NCCD, in terms of the provisions of Section 75 of the Customs Act, 1962; reliance was also placed on the judgement of the Hon'ble High Court of Himachal Pradesh in the case of Indo Farm Tractors & Motors Ltd [2008 (222) ELT 184]; the order of the CESTAT, Ahmedabad in case of M/s Paras Petrofils Ltd reported in [2008 (237) ELT 367] and the order of the Tribunal in the case of Superfine Syntex Pvt. Ltd. [2009 (237) E.L.T. 292];

(d) The appellate authority erred in interpreting the following Circulars issued by the Board and arriving at a conclusion that drawback of NCCD was available:-

- (i) Circular No. 11/2005-Cus dated 03.03.2005, inasmuch as the Board had clarified that since the element of Education Cess had been factored in All Industry Rates of Duty Drawback, the element of Education Cess needed to be factored in the Brand Rates and Special Brand Rates of duty drawback; that no similar clarification had been issued by the Board that NCCD has been factored in All Industry Rates of Duty Drawback and hence this Circular was distinguishable.
- (ii) Circular No. 106/95-Cus dated 11.10.1995, wherein the Board had clarified that anti-dumping duty which was leviable under Section 9A of the Customs Tariff Act, read with Section 12 of the Customs Act, 1962, is rebatable as Drawback in terms of Section 75 of the Customs Act, 1962; that this Circular was not applicable to NCCD, as it was levied under Section 134 of the Finance Act, 2003 and hence distinguishable.
- (iii) Circular No. 22/2006-Cus dated 21.08.2006, wherein the issue involved was whether NCCD was leviable in case of import of crude petroleum oil under Advance License (Authorisation) and Duty Free Import Authorisation (DFIA) Schemes, when basic customs duty, additional customs duty, anti-dumping duty and safeguard duty were exempted vide Notification No. 93/2004-Cus dated 10.09.2004 and Notification No.40/2006-Cus dated 01.05.2006 and the Board had clarified that in absence of any enabling provision in the FTP and said notifications providing exemption from NCCD, the same was leviable. It was submitted that the appellate authority distinguished the Circular on the grounds that the same dealt with exemption of duty whereas the instant issue pertained to levy of NCCD as duty of Customs; that the Board, by creating exception in the provisions contained under sub section (4) of Section 134 of the Finance Act, 2003, clarified that no

exemption was available to NCCD on the goods imported under Advance Licenses (Authorisation) and Duty Free Import Authorisation (DFIA) Schemes in absence of any provisions in the said notifications; that by applying the same ratio, the provisions relating to drawback of customs duty prescribed under Section 75 was also not applicable to NCCD levied under the Finance Act; and

(e) The Tribunal had erred in rejecting their appeal.

In light of the above submissions, they prayed that the impugned Order-in-Appeal may be set aside to the extent of the 18 appeals of respondent being allowed and restore the original Orders/Letters of the Additional Commissioner, Customs & Central Excise, Rajkot.

4. Personal hearing in the matter was granted to the applicant on 22.10.2021, 29.10.2021 and 30.11.2021, however, no one appeared on behalf of the applicant. Shri Karan Sarawagi and Shri Devang Mankad, both Advocates, appeared online on 30.11.2021 on behalf of the respondent and submitted that in the instant matter their applications have already been decided by the Revisionary Authority, Delhi and promised to submit a copy of the said Order.

5. The Advocates for the respondent vide letter dated 09.12.2021 submitted copy of Order No.122-131/13-Cus dated 22.05.2013 passed by the Joint Secretary (Revision Application), Delhi, in response to Revision Applications filed by the respondent company against the impugned Order-in-Appeal dated 23.01.2012.

6. Government has carefully gone through the relevant case records available in the case file, the written and oral submissions and also perused the impugned Orders-in-Original/Letters and the Order-in-Appeal dated 28.02.2013.

7. Government finds that in this case, both, the applicant as well as the respondent had filed appeals against the impugned Order-in-Appeal. The respondent had challenged the part of the Order-in-Appeal which decided the 10 cases against them before the JS (RA), New Delhi and the same was decided vide the above referred Order dated 22.05.2013. The Department/Applicant had also filed appeals against the portion impugned Order-in-Appeal pertaining to the 18 cases decided in favor of the respondent, however, the same was before the Hon'ble Tribunal. The Tribunal having dismissed the appeals as non-maintainable vide its Order dated 12.09.2019, the Applicant has now filed the instant Revision Applications. Thus, Government notes that of the 28 cases decided by the impugned Order-in-Appeal, the issue for revision before it is limited to the 18 cases, against which appeals have been preferred by the applicant.

8. Government notes that the applicant has filed the present application on 05.12.2019 against the impugned Order-in-Appeal dated 23.01.2012; i.e., after a period of almost seven years, which, is way beyond the period specified for preferring an appeal before the Revisionary Authority. Government notes that an application seeking condonation of the delay in filing the present application would have been in order, which unfortunately has not been done. However, given the fact that the applicant had filed an appeal before the Tribunal, which in its Order dated 12.09.2019 gave them the liberty to file the present application and the same having been filed within three months from the date of the said Order of the Hon'ble Tribunal, Government, in the larger interest of justice condones the delay and takes up the case for being decided on merits.

9. Government notes that the issue involved in the said 18 cases under challenge is whether the incidence of NCCD paid on the input, viz. 'Crude Oil' imported and used in the manufacture of goods which were exported by the applicant, can be included for calculating the Brand Rate of duty Drawback. Government notes that the Commissioner (Appeals) had

allowed the same, which has been contested by the applicant on the grounds that the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 provide for drawback of Customs duties leviable under Section 75 of the Customs Act, 1962 and since NCCD was levied under Section 134 of the Finance Act, 2003, the duty incidence of NCCD could not be factored while calculating the Brand Rate of duty drawback. Government finds that the issue is no more *res-integra* and has been clarified by the Central Board of Indirect Taxes & Customs vide Instruction no.5/2020-Customs dated 12.05.2020. The relevant portion of the said Instruction is reproduced below:-

*" Subject: Incidence of National Calamity Contingent Duty (NCCD) for calculation of Brand Rate of duty drawback.*

*Please refer to Board's Instruction No. 4/2019- Customs dated 11.10.2019 clarifying the position regarding Education Cess, Secondary and Higher Education Cess, Social Welfare Surcharge, Clean Environment Cess (erstwhile Clean Energy Cess) and Stowage Excise Duty levied on inputs used in the manufacture of export goods with regard to their incidence for the purpose of calculation of Brand Rate of duty drawback*

*2. Subsequent to the above, representations have been received in the Board seeking inclusion of the incidence of National Calamity Contingent Duty (NCCD) levied on the inputs used in the manufacture of export goods in calculation of Brand Rate of duty drawback.*

*3. The matter has been examined keeping in view the relevant statutory provisions, Customs and Central Excise Duties Drawback Rules, 2017 and Board's Instruction No. 4/2019- Customs dated 11.10.2019. NCCD is levied under Section 136 of Finance Act, 2001 as a duty of excise and under Section 134 of Finance Act, 2003 as a duty of customs. These legislations respectively inter-alia provide that provisions of Central Excise Act, 1944, Customs Act, 1962 and rules and regulations made thereunder including those relating to refunds, exemptions etc. shall apply to this levy. Section 75 of the Customs Act, 1962 allows drawback of duties of customs chargeable under the Act. Section 12 of the said Act provides for levy of duties of customs at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force. NCCD is also taken into account in the calculation of All Industry Rates of duty drawback by the Drawback Committee.*

*3.1 It is, therefore, clarified that the incidence of NCCD where applicable, is required to be factored in calculation of Brand Rate of duty drawback.*



*4. Field formations are requested to deal with applications for fixation of Brand Rate of duty drawback accordingly. ....”*

A plain reading of the above instruction indicates that NCCD is levied under Section 134 of the Finance Act, 2003 as a duty of Customs and that the provisions of the Customs Act, 1962 shall apply to the same. It is further clarified that Section 75 of the Customs Act, 1962 allows for drawback of duties of Customs and that Section 12 of the Customs Act, 1962 provided for levy of duties of Customs. Given the above legal position and also for the reason that NCCD was taken into account for calculation of All Industry Rates of duty drawback by the Drawback Committee, the Board had clarified that the incidence of NCCD is required to be factored in the calculation of Brand Rate of duty drawback and had directed the field formations to deal with applications received for fixation of Brand rate of duty drawback accordingly. Government finds that the Commissioner (Appeals) in the impugned Order-in-Appeal had arrived at similar findings to hold that the respondent would be eligible for the incidence of NCCD paid by them on the imports of 'Crude Oil' to be factored while calculating the Brand rate of duty Drawback. Government finds that the issue stands settled in favor of the respondent as clarified by the Board vide its above mentioned Instruction. In view of the above, Government finds the portion of impugned Order-in-Appeal pertaining to the 18 appeals, which have been contested vide the present Revision Applications, to be legal and proper.

10. As regards the submission of the respondent that the issue was already decided by the Joint Secretary (RA), Delhi vide Order dated 22.05.2013, Government notes that the said Order was passed in response to the Revision Applications filed by the respondent wherein they had contested the part of the impugned Order-in-Appeal pertaining to the 10 cases which were decided against them. The portion of the impugned Order-in-Appeal dealing with the rest of the 18 cases which has been contested by the Department vide the subject Revision Application, was not

an issue for decision before the Joint Secretary (RA), Delhi. Government observes that the JS (RA) in the Order dated 22.05.2013 had made the following observation:-

*“Government observes that the department vide their written submission S.No.VIII/20-57/Cus T/2010 dated 06.03.2010 contested the case on merit also by stating that NCCD is not a duty of customs and hence, cannot be considered for fixation of brand rate of drawback. In this regard, Government finds that in impugned case, the applicant filed 28 appeals before Commissioner (Appeals), who decided 18 appeals on merit in favour of applicant. The department has not filed any revision application against impugned orders-in-appeal allowing drawback in respect of NCCD. So, department has failed to avail the available legal remedy, As such, orders of Commissioner (Appeals) allowing drawback of NCCD has attained finality. Hence contention of applicant in these revisionary proceedings cannot be considered. The respondent department has not filed any counter submission with reference to grounds of these revision applications.”*

A reading of the above indicates that the JS (RA), Delhi vide the above order has quashed the Department's submission that drawback of NCCD would not be available in the 10 appeals that were contested before the Revisionary Authority and does not pertain to the 18 appeals that have been contested in the present Revision Applications. As regards the observation that the said impugned Order-in-Appeal had attained finality as the Department had not contested the same, Government notes that it stems from the fact that the Department had failed to apprise the JS (RA), Delhi that they had preferred an appeal before the Tribunal. Government notes that given the fact that the issue to be decided by the JS (RA), Delhi was limited to only that portion of the impugned Order-in-Appeal pertaining to 10 appeals contested by the respondent, the observations made by the JS (RA), Delhi with respect to the rest of 18 appeals will be in the nature of 'obiter dictum' and cannot be treated as an order deciding the merits of the 18 appeals which have been contested by the subject Revision Application.

11. In view of the above, Government finds the portion of the impugned Order-in-Appeal dated 23.01.2012, which allowed for the incidence of NCCD

to be factored while computing the Brand rate Drawback with respect to the 18 appeals, which have been contested by the present Revision Applications, to be proper and legal.

12. Having held so, Government remands all the cases back to the original authority to examine determination of the brand rate of drawback in light of above observations by considering the duty incidence on account of NCCD wherever the respondent produces the evidence of having suffered such incidence of NCCD. The respondent is directed to furnish the proof of payment of such duty before the original authority. The original authority will provide the respondent sufficient opportunity within eight weeks from the date of receipt of this order to produce the said evidence. Final order may be passed considering sufficiency of the evidence.

13. The subject Revision Applications are disposed of in the above terms.

  
30/1/23  
(SHRAWAN KUMAR)

Principal Commissioner & Ex-Officio  
Additional Secretary to Government of India

69-86  
ORDER No. /2023-CUS (WZ) /ASRA/Mumbai dated 30.01.2023

To,

The Commissioner of Customs (Preventive),  
"Sarda House", Bedi Bunder Road,  
Opp. Panchwati Jamnagar - 361008,  
GUJARAT.

Copy to:

1. M/s Nayara Energy Limited, (Formerly known as M/s Essar Oil Limited)  
P.O. Box 24, Khambhaliya - 361305, Dist. Dev Bhumi Dwarka.
2. The Commissioner (Appeals), Customs & Central Excise, Rajkot.
3. M/s TLC Legal, Advocates, Nirmal, 1<sup>st</sup> & 19<sup>th</sup> floor, Nariman Point,  
Mumbai - 400 021.
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file
6. Notice Board.