SPEED POST
REGISTERED 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.371/57-68/DBK/2023-RA /2361 Date of Issue: 17.10.2023
F. No.371/32-43/DBK/2023-RA

ORDER NO.737-757/2023-CUS (WZ) /ASRA/Mumbai DATED 12.10.2023 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	:	M/s Nayara Energy Limited, (Formerly known as M/s Essar Oil Limited) P.O. Box 24, Head Post Office, Khambhalia, Dist. Devbhumi Dwarka, Gujarat – 361 305.
Respondent	:	Pr. Commissioner of Customs (Preventive), Jamnagar.
Subject	:	Revision Applications filed under Section 129DD of the Customs Act, 1962 against the Orders-in-Appeal No.JMN-CUSTM-000-APP-122-133-22-23 and No.JMN-CUSTM-000-APP-137-148-22-23 dated 08.12.2022 and 05.01.2023, respectively, passed by the Commissioner of Customs (Appeals), Ahmedabad.

ORDER

The subject Revision Applications have been by filed M/s Nayara Energy Limited, formerly known as Essar Oil Limited (here-in-after referred to as 'the applicant') against the Orders-in-Appeal No.JMN-CUSTM-000-APP-122-133-22-23 and No.JMN-CUSTM-000-APP-137-148-22-23 dated 08.12.2022 and 05.01.2023, respectively, passed by the Commissioner of Customs (Appeals), Ahmedabad. The Order-in-Appeal dated 08.12.2022 decided appeals filed by the applicant against 12 Brand Rate Fixation Orders and Order-in-Appeal dated 05.01.2023 too decided appeals filed by the applicant against 12 Brand Rate Fixation Orders, all passed by the Additional Commissioner, Customs Commissionerate (Preventive), Jamnagar. The issue involved in both the impugned Orders-in-Appeal being identical, the same are taken up for decision together.

2. Brief facts of the case are that the applicant exported petroleum products manufactured by them under claim of duty Drawback, using both imported and indigenously procured crude oil. They filed applications for fixation of brand rate of drawback along copy of Cost Sheet certified by independent Chartered Accountant and calculation of amount of brand rate of duty drawback. The original authority requested them to submit the exact quantum of excise duty suffered by them and the duty structure on indigenously procured raw material. The applicant informed that they had taken up the matter with their supplier but had not received the required information, and hence to avoid delay in fixing the brand rate, they requested the original authority to fix the same in respect of imported crude oil only. The applicant further submitted that they had entered into a long term purchase contract with M/s Vedanta Limited from whom they procured crude oil indigenously against a commercial invoice wherein the value indicated was all inclusive price, i.e. including all duties and taxes. They further submitted that NCCD had specific rate of duty and hence the same could be calculated on the basis of consumption and no further evidence was required. The original authority, in both the above mentioned Orders-in-Original, held that while seeking fixation of brand rate of Drawback the appellant was under obligation to provide particulars of duty incidence suffered by them and in the absence of the same, it was not possible to factor the quantum of NCCD suffered, if any, on the indigenously procured Crude Oil to compute the brand rate of Drawback. Aggrieved, the

applicant filed appeals before the Commissioner (Appeals) against the said 66 Brand fixation letters issued by the original authority. The Commissioner (Appeals), in both the impugned Orders-in-Appeal, upheld he decisions of the original authority and rejected the appeals preferred by the applicant.

3. Aggrieved by the impugned Orders-in-Appeal dated 08.12.2022 and 05.01.2023, the applicant has filed the subject Revision Applications. The grounds on which they have been preferred are identical and are as follows:-

(a) They submitted that they were under no obligation to produce evidence of duty incidence actually having been suffered and the same was irrelevant for determination of brand rate of duty drawback in terms of Rule 6 of the Drawback Rules, 2017; that the commercial invoice issued by M/s Vedanta Limited recorded that the price stated therein was inclusive of all taxes and duties and hence the decision of the lower authority to hold that they had not produced any evidence to establish the payment of duty was without basis;

(b) That the expression 'Drawback' has been defined in Rule 2(a) to mean "in relation to any goods manufactured in India and exported, means the rebate of duty excluding integrated tax leviable under sub-section (7) and compensation cess leviable under sub section (9) respectively of Section 3 of Customs Tariff Act, 1975 chargeable on any imported materials or excisable materials used in the manufacture of such goods" and that it was evident from the said expression that drawback is the rebate of duty chargeable on excisable material used in the manufacture of goods exported; that the expression used was "chargeable" and not actually levied or discharged, a fact which the lower authorities had overlooked;

(c) That the expression 'excisable material' defined by Rule 2(b) to mean any material produced or manufactured in India subject to duty of excise made it clear that what is to be examined is the liability of duty of excise and did not required the evidence of actual duty to have been discharged;

(d) That Rule 6 of the Drawback Rules, 2017 stipulated that where no rate of drawback is fixed, any exporter can apply for determination of drawback wherein they were required to details pertaining to the proportion of materials or components used in the production or manufacture of goods

and duty paid on such material and components; that the reference made to duty paid in the said Rule was a reference to duty payable in general on excisable material and not the evidence of actual duty having been paid on the excisable materials;

(e) That in terms of Rule 10 of the Drawback Rules, 2017, the Commissioner (Appeals) should have held that if the original authority wanted evidence regarding the duty having been paid, they should have sought the same from their supplier, M/s Vendanta Limited rather than drawing an adverse inference;

(f) That the Commissioner (Appeals) had erred in upholding the decision of the original authority wherein the quantum of NCCD suffered on the procurement of crude oil was not factored while fixing the brand rate of drawback on the grounds that evidence of payment of the same was not produced as NCCD was leviable at a specific rate and the invoice issued by their supplier had indicated that the same inclusive of all taxes; that there was no dispute the domestically procured crude oil had suffered the incidence of NCCD; that merely because precise duty payment particulars were not submitted was not reason enough to deny them the benefit of brand rate fixation; that the NCCD being leviable at specific rate, the quantum of consumption of crude oil should be enough to determine the incidence of NCCD for the purpose of fixing the brand rate of Drawback;

(g) That drawback was in respect of duty chargeable on imported/chargeable material used in the manufacture of goods and not on duty actually paid, as had been wrongly presumed by the lower authorities; that the lower authorities had sought to impose conditions which have not been prescribed by the Customs Act, 1962 or the Customs & Central Excise Duties Drawback Rules, 2017; that in terms of the definition of 'drawback' and 'excisable material' under the Drawback Rules and Central Excise Act, 1944, respectively, Drawback rate was required to be fixed, once it was established that the excisable material used in the manufacture of export products were chargeable to Central Excise duty, irrespective of the factum of evidence regarding such duty payment having been suffered by the claimant;

(h) That it was not the Department's case that the indigenously procured crude oil was either not dutiable or had been procured without payment of

duty and hence it could not refuse to fix brand rate of duty drawback on the grounds that the quantum of incidence of duty suffered was not forthcoming, when such quantum was easily ascertainable as NCCD was at specific rate; that it was settled law that material available in the market are deemed to be duty paid unless contrary was proved; they sought to place reliance on the decision of the Hon'ble Tribunal in the case of Usha Udyog vs CCE, Kanpur [2001 (136) ELT 1031 (Tri)] which was upheld by the Apex Court [2002(144)ELT EIIA 298 (SC)] and the decision of the Hon'ble Punjab & Haryana High Court in the case of CCE, Jullundur vs Empet Indigenous P. Limited [2010 (253) ELT 756 (P&H)]; they also placed reliance on the decision of the Hon'ble Tribunal in the case of Upper India Steel Manufacturing & Engineering Co. vs GTE, Chandigarh [1997 (96) ELT 306 (Tri)] Penara Udyog P. Limited vs GTE, Kanpur [1998 (98) ELT 228 (Tri)] and CCE, Chandigarh vs Upper India Steel Manufacturing Co. Limited [1998 (99) ELT 703 (Tri)] in support of their argument that the material procured by them should be deemed to be duty paid;

(i) That Drawback being an export incentive scheme, should be liberally interpreted; that is a settled Government policy that it is the goods which are to be exported and not the local taxes; that the crude oil procured by them was inclusive of all taxes and hence brand rate for the same should have been fixed and not declined on the grounds that the applicant had failed to quantify the same;

(j) That the exports relevant to the present proceedings were made by them in the year 2013; that indigenous crude which was utilized along with the imported crude was procured only during this period only; that when the applications for fixing brand rate of duty drawback under Rule 6 were filed in 2013, and that if the Department at that time had called upon them to produce evidence of incidence of central excise duty actually suffered on the crude procured by it domestically from Cairn India Limited it would have been possible for Cairn India Limited to furnish the evidence of such payment, which would have been submitted by then to the authorities competent to fix brand rate of drawback, who, at that time was the jurisdictional Central Excise Commissioner; that however, at that time, the field officers of the Board were not clear as to whether NCCD could, at all, be treated as a duty of customs or a duty of excise, whose incidence suffered on crude could be taken into account while fixing the brand rate of drawback

under Rule 6 of the Drawback Rules and hence the brand rate of drawback fixation applications though, filed by them in 2013, could not be taken up for final disposal by the jurisdictional Central Excise authorities for a long time and were only taken up thereafter by the Customs authorities;

(k) That even though in Circular No. 4/2019 dated 11.10.2019, while the Board clarified that the incidence of certain cesses suffered by inputs had to be factored in fixing the Brand Rate of drawback in respect of goods where these had been used as inputs, such a clarification in the context of NCCD was given by the Board only vide its Circular No. 5/2020-Cus dated 12.05.2020 and that it was only after this clarification that the Additional Commissioner took up the matter for fixing the brand rate in respect of the Shipping Bills in question and while the brand rate has been fixed taking into account the incidence of customs duties (NCCD, EC & SHEC) suffered on the imported crude used in the export products, similar incidence of central excise duties suffered on domestic procurements has not been taken into account on the ground that actual duty paying documents were not submitted by them; that the Commissioner (Appeals) ought to have appreciated that there was a long gap of seven years, between the time of filing the applications for fixation of brand rate and the decision taken by the Additional Commissioner, for reasons entirely beyond their control; that not only there was a gap of seven years, when the documents showing actual payment of NCCD could be produced, but the ownership of both, the buying and selling companies also underwent a change i.e. Essar Oil Ltd. was taken over by Nayara Energy Ltd. and Cairn India Limited was taken over by Vedanta Ltd; that the concerned personnel, who dealt with the supplies of crude to Essar Oil Ltd. by Cairn India Limited in 2013 had changed and the relevant records were also not readily available;

(l) That the Commissioner (Appeals) ought to have appreciated that they had made repeated requests to Vedanta Limited, the present company, who took over Cairn India Ltd., for the requisite information and evidence in respect of payment of NCCD on the crude that was supplied by Cairn India Limited to them in 2013, but to no avail; that the Additional Commissioner and the Appellate Authority ought to have considered and appreciated this difficult situation while fixing the brand rate of duty drawback in respect of the goods exported long back in 2013; that this was not done and a very unreasonable view has been taken by the Appellate Authority observing that

since it was them who were interested in getting the brand rate of drawback fixed in respect of Shipping Bills in question, they were under an obligation to provide particulars of the duty incidence suffered by them, based only on documentary evidence; that hence the view taken by the Appellate Authority was extremely unreasonable, especially in view of the fact that there were alternative means to satisfy itself that the domestically procured crude oil did, indeed, suffer the incidence of NCCD and their failure to do so, had resulted in miscarriage of justice against them;

(m) That the Commissioner (Appeals) had erred in ignoring their submissions by citing para 29 and 2.10 from Chapter 22 of the CBEC Customs Manual; that the Commissioner (Appeals) ought to have appreciated that despite the fact that para 2.10 of the CBEC Customs Manual provided that in brand rate of drawback, the exporter was compensated the incidence of Customs and Central Excise duties actually incurred in the export product, based on verification of documents and proof of usage of actual quantity of materials or components utilized in the manufacture of export product and duties/taxes paid thereon, the said para was meant only for guidance of the field formations while fixing the brand rate of drawback, since the actual incidence of duties suffered on the input was to be compensated in the mechanism of Brand Rate Fixation as against the mechanism of average amount of duties suffered on the inputs while fixing of All Industry Rate (AIR); that while this was the normal requirement, it did not mean that if in a particular case, the exporter was not in a position to submit actual evidence indicating payment of duty on the invoices itself, the authorities while fixing the brand rate of drawback in such cases could not take into account any collateral evidence to satisfy themselves and deny a benefit to a genuine exporter, if the incidence of duties suffered on the input in question was otherwise available, as in the present case, NCCD on crude oil was specific;

(n) That the Commissioner (Appeals) blind reliance on para 2.10 in Chapter 22 of the CBEC Customs Manual and taking a mechanical view that they had failed to produce evidence of actual payment of NCCD by the supplier in respect of the commercial invoices in question under which crude was supplied to it, was erroneous and totally against the spirit of the law for fixing brand rate of drawback; that the Commissioner (Appeals) ought to have appreciated that the provision in Para 2.10 of the CBEC

Manual was only for guidance of the concerned authorities and was not in the nature of any legal provisions in the Customs Act. 1962 or in the relevant Drawback Rules; that he ought to have appreciated that there was nothing in Rule 6 of the Drawback Rules which provided that if the exporter was not in a position, for reasons which were genuine, to submit actual evidence of duty payment in the form of documents, that the brand rate could not be fixed based on other collateral and contemporaneous evidence to the satisfaction of the authorities; that Rule 6 of the Drawback Rules merely required that in the application for fixation of brand rate, an exporter will state all the relevant facts including the proportion in which the materials are used in the production or manufacture of goods and the duties paid on such materials; that duties have been suffered on inputs, can be established only by seeing a Bill of Entry or an invoice where payment of such duty is specifically indicated, is not absolutely necessary nor is it a requirement prescribed in law; that the Commissioner (Appeals) ought to have accepted their submission that so far as the crude procured by them domestically in 2013 was concerned there was no chance that NCCD was not paid;

(o) The Commissioner (Appeals) ought to have appreciated that the CBEC, in exercise of its delegated legislation, had framed the Manual of Supplementary Instructions and as the name suggests, the said instructions are supplementary to the Act and the Rules and have to be read in conjunction thereof; that the said instructions could not create any rights or impose any obligations; that the view taken by the Additional Commissioner was totally misconceived and untenable;

(p) that the Commissioner (Appeals) had relied upon a decision of the Central Government in the Revision Application filed by National Industrial Corporation Limited [2016 (344) ELT 702 (GOI)]; that in that case the request of the applicant therein was to have brand rate fixed in respect of export goods where molasses was said to be used as input and in the absence of actual duty paying documents, it could not be said that the said molasses had indeed suffered duty incidence; that the observations made by Government in the Revision order relied upon by the Commissioner (Appeals) made this order relevant and inapplicable to the present one;

(q) That the reliance placed by the Commissioner (Appeals) on proviso (i) to Rule 3 of the Drawback Rules in para 10 of the impugned order was not relevant in the present proceedings as it dealt with cases where AIR has been fixed but when it comes to the notice of the drawback sanctioning authorities that only some of the inputs have suffered duty incidence and not others, then no drawback is to be given;

In light of the above submissions, they prayed that the impugned Orders-in-Appeal be set aside and with directions to the Additional Commissioner to factor the incidence of NCCD suffered by the crude oil procured by them domestically while fixing the brand rate of duty drawback.

4. Personal hearing in the matter was held on 28.06.2023 and Shri Kartik Dedhia, Advocate, appeared online on behalf of the applicant. He submitted that their claim for drawback was rejected on the ground that invoice did not show duty payment. He submitted that invoice mentions that all duties are included and that should be sufficient. He finally requested to allow the application. No one appeared on behalf of the respondent.

5. Government has carefully gone through the relevant case records, the written and oral submissions and also perused the Orders of the Additional Commissioner and the impugned Orders-in-Appeal.

6. Government notes that the issue involved in both the impugned Orders-in-Appeal is whether the decisions of the lower authorities to not factor the quantum of NCCD on the indigenously procured 'Crude oil' while fixing the Brand rate of Drawback for the reason that the applicant failed to produce any evidence to indicate payment thereof, is correct or otherwise. Government notes that it is the contention of the applicant that the laws governing the fixing of Brand rates of Drawback do not require them to produce such evidence and the same should be fixed on the basis of the duty deemed payable on such inputs.

7. Government notes that the fixing of Brand rate of Drawback in respect of goods exported was governed by the Customs and Central Excise Duties Drawback Rules, 2017 (DBK Rules, 2017) during the material period. Government proceeds to reproduce and examine the relevant portions of the same.

The relevant portion of Rule 3 and Rule 6 of the DBK Rules, 2017, reads as follows:-

*"**3. Drawback.**– (1) Subject to the provisions of –*

(a) *the Customs Act, 1962 (52 of 1962) and the rules made thereunder;*

(b) *the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder; and*

(c) *these rules, a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government :*

Provided that where any goods are produced or manufactured from imported materials or excisable materials, on some of which only the duty chargeable thereon has been paid and not on the rest, or only a part of the duty chargeable has been paid; or the duty paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained

Provided further that no drawback shall be allowed –

(i) *if the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture;*

(ii) *if the said goods are produced or manufactured, using imported materials or excisable materials in respect of which duties have not been paid;....."*

(2) In determining the amount or rate of drawback under this rule, the Central Government shall have regard to, -

(a) *the average quantity or value of each class or description of the materials from which a particular class of goods is ordinarily produced or manufactured in India;*

(b) *the average quantity or value of the imported materials or excisable materials used for production or manufacture in India of a particular class of goods;*

(c) *the average amount of duties paid on imported materials or excisable materials used in the manufacture of semis, components and intermediate products which are used in the manufacture of goods;*

(d) *the average amount of duties paid on materials wasted in the process of manufacture and catalytic agents:*

Provided that if any such waste or catalytic agent is re-used in any process of manufacture or is sold, the average amount of duties on the waste or catalytic agent re-used or sold shall also be deducted;

(e) *the average amount of duties paid on imported materials or excisable materials used for containing or, packing the export goods;*

(f) *any other information which the Central Government may consider relevant or useful for the purpose.*

.....

.....

6. Cases where amount or rate of drawback has not been determined.-

(1)(a) Where no amount or rate of drawback has been determined in respect of any goods, any exporter of such goods may, within three months from the date relevant for the applicability of the amount or rate of drawback in terms of sub-rule (3) of rule 5, apply to the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, having jurisdiction over the place of export, for determination of the amount or rate of drawback thereof stating all the relevant facts including the proportion in which the materials or components are used in the production or manufacture of goods and the duties paid on such materials or components:

A reading of the above indicates the first proviso to Rule 3(c) and Clause (ii) to the second proviso lay down that in cases where duty chargeable has not been paid or short paid, the Drawback admissible shall either not be paid or be reduced taking into account such lesser duty paid. Given this legal position, the argument put forth by the applicant that Brand rate of Drawback in their case should be fixed on the basis of duty 'chargeable' on imported/excisable material used in the manufacture of goods and not on duty actually paid, is incorrect. Government notes that the above Rules clearly provide for non-payment of Drawback in those cases where the duty chargeable has not been paid or short paid. Further, it is also a fact that Drawback payable is determined in two different ways, the first one being the All India Rate which is determined by the Government on the basis of averages of several parameters like quantity of inputs consumed, duties paid etc., which is payable to the exporter without verification of any duty paying documents. It is in this context that the phrase 'chargeable to duty' with respect to the inputs becomes relevant. The second method of determining

Drawback involves fixing of Brand rate of Drawback with respect to an individual exporter as provided by Rule 6 of the DBK Rules, 2017. In such cases, as indicated by the extract of the said Rule reproduced above, it is imperative on the part of the exporter applicant to submit all the relevant facts including the proportion in which the material or components are used in the manufacture and duties paid on such material or components. There is no gainsaying the fact that when such details regarding consumption and duties involved are provided by the exporter, the same should be supported by proper evidence and it is not the case that the submission of the exporter should be accepted by the competent authority without any verification as suggested by the applicant in the present case. Government finds that the Board had vide Circular F. No.609/24/2002-DBK dated 24.06.2002 had provided the guidelines for fixation of Brand Rate of Drawback under the Simplified Scheme. Para 4 of the said Circular is reproduced below: -

> *" While submitting the Brand Rate applications, the exporters are required to neatly page number the essential annexures/documents and to enclose them strictly in the order of DBK-I, DBK-II/IIA, DBK-III/IIIA Statements, Shipping Bill/s, Bill of Entry, Invoices regarding payment of Central Excise duty, CENVAT availment/non-availment-Certificate/ Declaration; Working Sheet, Statement of Value Addition and Statement of Exports etc. Further, these should be flagged/marked distinguishably to facilitate preliminary checking of these documents by the Receipt Clerk while receiving the applications. In case of merchant exporters/manufacturer-exporters who are getting the export products manufactured from their supporting manufacturers/vendors, as the case may be, a separate declaration, inter alia, furnishing the details of the supporting manufacturer/ vendors, Central Excise Registration No., if any, availment/non-availment of the CENVAT benefit, duly authenticated by the Superintendent of Central Excise having jurisdiction over the manufacturing unit are required to be furnished.* ***The exporters are required to furnish original duty paying documents, viz; Bills of Entry pertaining to the imported items and Invoices evidencing payment of Central Excise Duty in respect of the indigenous inputs with reference to the claim of Brand Rate of drawback.*** *These original duty paying documents which have been fully utilized with the Brand Rate claim will be retained in this Ministry. The duty paying documents which have been partially utilized for disposal of the Brand Rate claim, will however be returned to the exporters along with requisite endorsement. Applications for issue of amendment and corrigendum to the Brand Rate letters are required to be filed maximum within a period of 3 months. Specimen copies of the revised format of the application for fixation of Brand Rate and DBK-I,II/IIA and III/IIIA Statements are attached.*
>
> [emphasis supplied]

As can be seen from the above, the Board vide the above Circular which lays down the guidelines for claiming Drawback, has clearly laid down that in the case of fixation of Brand Rate of Drawback, the exporters are required to furnish original duty paying documents, which in this case would be the Invoices evidencing payment of Central Excise Duty in respect of the indigenously procured 'Crude Oil' by the applicant. Thus, Government does not find fault with the decision of the lower authorities in requiring the applicant to the submit evidence indicating payment of duty on the Crude Oil procured by them indigenously. In view of the above, Government finds the argument of the applicant that the Brand rate of Drawback in their case should have been fixed by the original authority on the basis of the 'duty payable on the inputs consumed' to be ill-found and not in consonance with the legal provisions governing the same.

8. Government further notes that the applicant has taken issue with the action of the original authority asking for evidence to indicate that indigenously procured Crude Oil had suffered the duty on which Drawback was being claimed by them. Government finds Rule 10 of the DBK Rules, 2017 to be relevant in this context and the same is reproduced below:-

> ***10. Power to require submission of information and documents.*** *- For the purpose of –*
>
> (a) *determining the class or description of materials or components used in the production or manufacture of goods or for determining the amount of duty paid on such materials or components; or*
>
> (b) *verifying the correctness or otherwise of any information furnished by any manufacturer or exporter or other persons in connection with the determination of the amount or rate of drawback; or*
>
> (c) *verifying the correctness or otherwise of any claim for drawback;* or
>
> (d) *obtaining any other information considered by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be, to be relevant or useful, any officer of the Central Government specially authorised in this behalf by an Assistant Commissioner of Customs or Deputy Commissioner of Customs, as the case may be, may require any manufacturer or exporter of goods or any other person likely to be in possession of the same to furnish such information and to produce such books of account and other documents as are considered necessary by such officer.*

A reading of the above Rule indicates that it was well within the powers of the original authority to call for evidence indicating payment of duty on the Crude Oil indigenously procured by the applicant for factoring the same while fixing the Brand Rate of Drawback with respect to the goods exported by the applicant. Government finds that the applicant has submitted that the original authority, in case of doubt, should have called for the details of the duty paid from their supplier and not from them. In this context, Government finds that Rule 11 of the Central Excise Rules, 2002 provides that all duty paid goods, which in this case is 'Crude Oil' procured directly from the indigenous manufacturer by the applicant, should be accompanied by a Central Excise Invoice which indicates the quantum of the various duties paid on the goods covered by it. It is not in dispute that the said 'Crude Oil' was procured by the applicant from a unit within the country and hence the applicant should have been in possession of such Central Excise Invoices indicating duty paid by their supplier. Government finds that the Board's Circular dated 24.06.2002, cited above, clearly requires the applicant to submit such Invoices indicating payment of Central Excise duty on the inputs procured indigenously when they applied for fixation of Brand rate of Drawback. Government finds that the applicant to be indulging in prevarication when they submit that they do not have any duty paying documents with respect to the indigenously procured 'Crude Oil' and that they received the said input under a 'Commercial Invoice' which indicated a composite price which was inclusive of taxes; it will not help their cause. Further, Government notes that the applicant has submitted that their case should have been decided on the basis of contemporaneous evidence, however, Government finds that the applicant, apart from making a bald statement that the said input should be deemed to be duty paid, has not produced a shred of evidence in support of their claim that the said input had suffered Central Excise duty.

9. Government finds that the applicant has relied on several case laws, cited above, in support of their argument that the onus was on the Department to prove the non-duty paid nature of goods. Government has examined them and finds that the facts of the cases cited to be different from the instant one. In the case of Usha Udyog vs UOI [2002 (144)ELT A298 (SC)] cited by the applicant, the Hon'ble Supreme Court had held that for availing deemed credit Iron and Steel re-rollable material bought from the open market are to be deemed as duty paid unless contrary proved by

the Department. Government notes that the instant case differs from the cited one inasmuch as in the present case the applicant, as submitted by the applicant themselves, had procured the inputs directly from the manufacturer themselves on the basis of a long term contract and it is not the case that they procured the input 'Crude Oil' from the open market. As stated earlier, when the procurement is directly from a manufacturer, the applicant is supposed to be in possession of the Central Excise Invoice under which the manufacturer cleared the goods. Thus, the present case is clearly different from the one cited and hence the same will not be applicable here. Government finds that the other cases cited by the applicant involved denial of 'Deemed Modvat/Cenvat credit' on inputs. Once again, Government finds that the issue involved is different and deals with a scenario wherein the Modvat/Cenvat was denied on goods which were deemed to be duty paid. Government finds that the present issue is that of fixation of Brand rate of Drawback involving inputs procured by the applicant directly from the manufacturer in respect of which they failed to produce evidence indicating payment of duty and hence different from the cases cited by the applicant in their defense. Thus, the cases cited by the applicant in their defense will not have any application here.

10. Further, Government also finds that the applicant themselves had requested the original authority to treat the indigenously procured 'Crude Oil' as non-duty paid and fix the Brand Rate of Drawback accordingly, which they later stated was to avoid delay in fixing of the Brand rate. Government finds it a bit strange that the applicant subsequently changed their stand and are now insistent that the original authority factor the 'duty payable' on such indigenously procured 'Crude Oil' while fixing their Brand Rate of Drawback based on the documents/data submitted by them earlier.

11. In view of the above, Government finds the contention of the applicant that the lower authorities should have allowed the duty payable on the indigenously procured 'Crude Oil' to be factored while fixing the Brand Rate of Drawback in respect of the goods exported by them, to be improper and against the legal provisions governing the fixing of Brand Rate of Drawback. Government finds that the Commissioner (Appeals) has correctly held that the applicant having failed to produce evidence with regard to the NCCD paid on the Crude Oil procured indigenously, it was not possible at this

juncture to factor the quantum of duty suffered, if any, on such input, in the Brand rate of Drawback.

12. Further, Government finds that the applicant has submitted that they are not in a position to furnish the duty paying documents with respect to the indigenous procured 'Crude Oil', as the Department had asked for the same after the passage of few years of them filing the application during which time their ownership and that of their supplier underwent a change. As submitted by the applicant themselves, Government notes that the applications made by the applicant for fixation of Brand Rate of Drawback were taken up for disposal, after the issue of whether NCCD could be factored while fixing the Brand Rate of Drawback was settled by the Hon'ble High Court and the subsequent clarification issued by the Board. However, as pointed out earlier in this Order, the Board vide Circular F.No.609/24/2002-DBK dated 24.06.2002 had clearly specified that an applicant seeking Brand Rate fixation of Drawback is required to submit copies of all the relevant documents, which includes Invoices evidencing payment of Central Excise Duty in respect of indigenous inputs when filing such claim. Thus, Government finds that the applicant should have submitted the Invoices indicating payment of Central Excise Duty on the indigenously procured 'Crude Oil' at the time when they filed their applications seeking Brand Rate fixation of Drawback. Having not done so at that stage, the applicant cannot now turn around and claim that they are not in a position to do so, as the same has been asked for at a later stage when their claims were taken up for finalization. Thus, Government does not find any merit in this submission of the applicant and rejects the same.

13. Government notes that the applicant has submitted that the Commissioner (Appeals) relied on the instructions in the CBEC Manual while rejecting their claim and in the process had overridden statutory provisions of the Act and Rules governing the fixation of Brand Rate of Drawback. Government finds that this submission of the applicant to be incorrect and contrary to the facts as the Commissioner (Appeals) has clearly pointed out the relevant provisions in the DBK Rules, 2017 while deciding their case and has made a reference to the CBEC Manual wherein the requirement of verification of documents indicating payment of duty on the inputs has been mentioned. Government notes that it is the contention of the applicant that such verification, as provided for in the CBEC Manual,

should be dispensed with and the input 'Crude Oil' indigenously procured by them should be treated as deemed to be duty paid. Government finds that this submission of the applicant borders on the preposterous, particularly given the fact that the applicant has been unable to produce any evidence, contemporaneous or otherwise, to indicate that Central Excise duty was paid on the indigenously procure 'Crude Oil'. Government finds that the Commissioner (Appeals), in both the impugned Orders-in-Appeal has addressed all the issues raised in a precise manner and has justified the conclusions arrived at. Thus, Government finds both the subject Orders-in-Appeal to be well reasoned and upholds both of them.

14. In view of the above, Government finds both the subject Revision Applications to be devoid of merits and rejects them.

Shrawan 12/10/23

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

ORDER No. 734-757 /2023-CUS (WZ) /ASRA/Mumbai dated 12.10.2023

To,

M/s Nayara Energy Limited, (Formerly known as Essar Oil Limited)
P.O. Box 24, Head Post Office,
Khambhalia, Dist. Devbhumi Dwarka,
Gujarat – 361 305.

Copy to:

1. The Commissioner of Customs (Preventive), Jamnagar.
2. The Commissioner of Customs (Appeals), Ahmedabad, 7th floor, Mridul Tower, Behind Times of India, Ashram Road, Ahmedabad – 380 009.
3. M/s TLC Legal, Advocates, Nirmal, 1st & 19th floor, Nariman Point, Mumbai - 400 021.
4. Sr. P.S. to AS (RA), Mumbai
5. Notice Board.