SPEED POST
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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
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. No.371/341 to 346/DBK/2021 7735 Date of Issue: 08 .11.2023

ORDER NO. 537/2023-CUS (WZ) /ASRA/Mumbai DATED 06.11.2023 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 General Motors India Private Limited, Plot No.A-16, MIDC, Talegaon Industrial Area, Phase – II, Expansion, Tahsil – Maval, Pune – 410 507.
Respondent	:	Commissioner of Customs (Export), Zone – I, New Customs House, Ballard Estate, Mumbai – 400 001.
Subject	:	Revision Application filed under Section 129DD of the Customs Act, 1962 against the Order-in-Appeal no. MUM-CUS-KV-EXP-67 to 72/2021-22 dated 28.09.2021 passed by the Commissioner of Customs (Appeals), Mumbai Zone – I.

ORDER

The subject Revision Application has been filed by M/s General Motors India Private Limited, Pune (here-in-after referred to as 'the applicant') against the Order-in-Appeal dated 28.09.2021 passed by the Commissioner of Customs (Appeals), Mumbai, Zone - I, which decided an appeal filed by the applicant against the Order-in-Original dated 05.06.2020 passed by the Joint Commissioner of Customs, BRU, NCH, Mumbai, which in turn had rejected the applications seeking Brand Rate fixation of Drawback filed by the applicant.

2. Brief facts of the case are that the applicant is a manufacturer and exporter of passenger motor vehicles falling under Chapter Heading 87.03 of the Customs Tariff and they availed the benefit of the 'Advance Authorization-cum-Drawback Scheme' with respect to some motor vehicles exported by them. The exported goods, apart from containing duty paid inputs also contained inputs which were procured without payment of duty as the applicant exported the goods in question under the Advance Authorization Scheme. The applicant filed applications for Brand rate fixation of Duty Drawback under Rule 6(1)(a) of the Customs and Central Excise Duties Drawback Rules, 2017 (DBK Rules, 2017) in respect of the consignments so exported. The original authority rejected the said applications on the ground that since All Industry Rate of drawback had already been notified for the product exported by the applicant under Rule 3 of the DBK Rules, 2017, they would not be eligible to claim Brand Rate of Duty Drawback under Rule 6 of the DBK Rules, 2017. The applicant filed appeal before the Commissioner (Appeals) resulting in the impugned Order-in-Appeal dated 28.09.2021, wherein the Commissioner (Appeals) upheld the order of the original authority and rejected the appeal.

3. Aggrieved, the applicant has filed the subject Revision Application against the impugned Order-in-Appeal on the following grounds:-

(a) That the impugned Order-in-Appeal dated 28.09.2021 is mere repetition of the Order of the original authority and there are no independent findings given by the Commissioner (Appeals); that the Commissioner

(Appeals) failed to record and consider the binding judicial precedent of Hon'ble High Court of Bombay in the case of CC, Pune Vs. Cummins India Ltd. [2015 (321) ELT 575 (Bom.)] wherein the very issue (identical both on facts as well as law) has been addressed and decided in favour of the assessee; that the Hon'ble High Court had held that All Industry Rate of Drawback shall not be applicable in case duty paid inputs are used for manufacture of finished goods exported out of India towards discharge of export obligation against advance authorization and the only option left in such a case is to claim brand rate drawback in terms of Rule 6;

(b) That notification no. 89/2017-Cus (NT) categorically prohibits for claim of All Industry Rate of Duty Drawback, if the goods are exported towards fulfilment of export obligation against Advance Authorisation; that they had hence not claimed All Industry Rate of duty Drawback;

(c) That sub rule (1) of Rule 6 is concerned, where all industry rate has not been determined under Rule 3 or Rule 4 in respect of the goods exported out of India, then the exporter can apply for brand rate of drawback under Rule 6; that Notification No. 89/2017- Cus (NT) dated 21.9.2017 does not specify any rate for exports made in discharge of export obligation under the Advance Authorisation scheme; that in other words, there is no rate of drawback specified or determined for the "class of goods viz, goods exported in discharge of export obligation under the advance Authorisation scheme. Hence, such class of goods are eligible for drawback under Rule 6; that as the motor vehicles exported by them fell within the class of goods for which there was no rate of drawback specified or determined in the said Notification and hence the only option left with them was to claim brand rate drawback in terms of Rule 6 hence the brand rate of duty drawback for motor vehicles exported was correctly available under Rule 6 and accordingly, the impugned Order-in-Appeal upholding Order-in-Original which denied brand rate of duty drawback was incorrect and liable to be set aside;

(d) That the intention of the legislature was always that All Industrial Rate of drawback shall not be applicable in case of export of commodity or product under Advance Authorisation scheme, as stipulated in the Notifications issued for All Industry rate of Duty Drawback issued from time to time; that however at the same time, the objective of Section 75 of the Customs Act read with the Drawback Rules, 2017 is to reimburse the duties paid on inputs/raw

materials hence they had correctly filed application for fixation of drawback under Rule 6 of Drawback Rules, 2017 in respect of motor vehicles exported against Advance Authorization since the All Industry Drawback rate was not available and applicable in such a circumstance;

(e) That issue identical to the present case has been settled by the Hon'ble Bombay High Court in Cummins India Ltd. [2015 (321) ELT 575 (Bom.)] in favour of the assessee wherein the order of the Revisionary authority allowing Drawback was upheld by the Hon'ble High Court;

(f) That circulars issued by CBIC from time to time supports the view expressed by them and that Circular No. 48/2011-Cus, dated 31.10.2011 clearly states that the benefits of All Industry Rates of duty drawback and Advance Authorisation Scheme are not available simultaneously. However, in such cases the exporter can always avail the brand rate of duty drawback under rule 6 or rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, as the case may be and subject to the conditions stipulated therein, for the duty paid inputs used in the manufacture of export goods; that reliance placed on Circular No. 38/2017-Cus dated 22.9.2017 in the impugned Order-in- Appeal was misplaced;

(g) That the applications for brand rate of duty drawback under Rule 6 made on 05.07.2018 was duly accepted and acknowledged by the Customs Department, Mumbai, BRU Section knowing fully that exports were made against Advance Authorisation and noo objection was raised at the time of filing application or thereafter till 11.02.2020 i.e. till the completion of more than one and half years; that it was almost after lapse of one year, the jurisdictional Customs department raised an objection (vide letter dated 11.02.2020) that drawback claim application had been wrongly filed under Rule 6; that the Customs department duly communicated that brand rate drawback in terms of Rule 6 was not applicable/ available in case of exports made against Advance Authorisation at initial stage, they would have filed revised drawback claim application in terms of Rule 7 of the Drawback Rules, 2017 well within the limitation period as available under the Customs law and relevant rules; that the claims ought not to have been rejected belatedly and such a rejection was violative of established principle laid down by the courts;

(h) That the Commissioner (Appeals) records that All Industry Rate has already been determined for the goods in question and accordingly, holds that

the present case is not the case of 'Nil' or 'No' rate of drawback and accordingly, brand rate of duty drawback was not available to the Applicant; that the above findings are incorrect in view of the submissions made them earlier.

In view of the above they prayed that the impugned Order-in-Appeal dated 28.09.2021 be set aside and they be granted Brand rate of duty drawback, as claimed, along with the applicable interest.

4. Personal hearing in the matter was granted on 04.07.2023 and Shri Ketan Bindra, Shri Ashish Modi, both Chartered Accountants, and Shri Sandeep Narvekar, G.M., appeared on behalf of the applicant. They submitted further written submissions in the matter and drew attention to the Order of the Bombay High Court in the case of Cummins India Limited. They also mentioned CBIC Circular no.48/2011-Customs clarifying the issue. They requested to allow their applications. No one appeared on behalf of the respondent.

4.1 The applicant vide their written submissions made during the course of the personal hearing, apart from submitting copies of the relevant provisions and Circulars also submitted that the Commissioner (Appeals) had vide a subsequent Order-in-Appeal dated 01.06.2022 had decided the issue in their favor.

4.2 On behalf of the respondent, the Deputy Commissioner of Customs, BRU, NCH, Mumbai vide letter dated 19.01.2022 reiterated the findings of the lower authorities and further submitted that in the decision of the Hon'ble High Court of Bombay in the case of Cummins India Limited though relief was given to the assessee the Hon'ble Court had not given any directions to consider the claims under Rule 6 of the DBK Rules, 2017 and hence this case law was not applicable to the instant case. Reliance was sought to be placed on the decision of the Hon'ble Supreme Court in the case of Chemicals and Fibres of India Limited vs UOI dated 11.02.1991 in support of their case.

5. Government has carefully gone through the relevant records, the written and oral submissions and also perused the Order-in-Original and the impugned Order-in-Appeal.

6. Government finds that that the issue in the present case is that the applicant exported motor vehicles under the Advance Authorization Scheme, for which they used certain duty free imported inputs in addition to duty paid inputs. Given the fact that all the inputs had not suffered duty, the applicant opted for Brand rate fixation of Duty Drawback as against availing the All Industry Rate (AIR), as the AIR would be applicable only if all inputs used for the manufacture of exported goods were duty paid. The lower authorities held that the applicant would not be eligible to claim Brand rate fixation of Duty Drawback in terms of Rule 6(1)(a) of the DBK Rules, 2017 as the exported goods viz., motor vehicles were classifiable under Chapter Heading 8703 for which drawback rate was notified in the Schedule of the All Industry Rate under Rule 3 of the DBK Rules, 2017. Government finds this view to be flawed in light of the facts of the present case, as the All Industry Rate takes into account all the duties suffered by the inputs contained in the goods which are exported, whereas in this case it is an admitted fact that certain inputs were procured by the applicant without payment of duty. Further, it is also a fact that some of the inputs used in the exported goods had suffered duty. Given these facts, the view taken by both the lower authorities would only result in drawback being denied to the applicant despite them having used inputs which had suffered duty thus resulting in the component of duty too being exported, which clearly is against the stated policy governing exports. Government finds that the Board vide its Circular dated Circular No.48/2011-Cus dated 31.10.2011 had taken cognizance of such situation and had clarified as under:-

> *9. Doubts have been expressed regarding simultaneous availment of benefits under Advance License / Scheme along with All Industry Rates of duty drawback. In this regard attention is invited to the sub para (b) of para (8) of the notes and conditions of the notification No. 68/2011-Cus. (N.T.) dated 22.09.2011. It stipulates that the All Industry Rate of drawback is not available if the goods are exported in discharge of export obligation*

against Advance Licence except under certain conditions. It is clarified that in general, the benefits of All Industry Rates of duty drawback and Advance Licence Scheme are not available simultaneously. However, in such cases the exporter can always avail the brand rate of duty drawback under rule 6 or rule 7 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, as the case may be and subject to the conditions stipulated therein, for the duty paid inputs used in the manufacture of export goods."

A reading of the above makes it clear that the applicant who is availing the benefit of the Advance Authorization Scheme would be eligible to avail of Brand Rate of Duty Drawback under Rule 6 or Rule 7 of the DBK Rules, 2017.

7. Further, Government finds that the Hon'ble High Court of Bombay had occasion to examine the very same issue, where, an Order of the Revisionary Authority which upheld the dropping of demand of drawback so disbursed, was challenged before it in the case of *Commissioner of Customs, Pune vs Cummins India Limited* [2015 (321) ELT 575 (Bom.)]. The relevant portion of the said decision is reproduced below:-

"He also submits that IC Engines exported by Cummins India Ltd. during the said period were manufactured availing all facilities under duty exemption scheme. Exports of IC Engines so manufactured using duty free imported inputs under the advance licence were not eligible to drawback in terms of the conditions imposed under the brand rate letters. Mr. Rao, would therefore, submit that the Order-in-Original should have not been confirmed and the appellate and the revisional authority have seriously erred in law in confirming the same.

4. *We have perused the writ petition and all the annexures thereto, including the Order-in-Original. The appellate authority was of the view that show cause notice alleged that the assessee have misdeclared and suppressed the material facts. They seem to suggest that there was no rate fixed of drawback on All Industry rate basis of IC Engines. However, the appellate authority concluded that the goods exported are IC Engines. The application for fixation of brand rate of drawback falling under Rule 6 pertains to IC Engines only. There is no misdeclaration of value or misdeclaration of the value either in the shipping bill or in the application for fixation of drawback. The finding of fact is that department had no information at particular time relating to duty saved under input output ratio etc. The only allegation is that in the application filed under Rule 6 the respondent assessee made a statement or declaration that there is no All Industry rate of drawback fixed or existing. In the order, the appellate authority held that this much is not enough to allege misrepresentation and suppression of material facts. Material facts are noted by the appellate authority and which were to the full knowledge of the Revenue. Merely*

making one statement in the application filed under Rule 6 and particularly against one item will not mean that drawback amount was erroneously granted and no amount should therefore, be demanded.

5. *It is this finding of fact which is confirmed by the revisional authority and the revisional authority had referred to all materials including the rules and found that the benefit of drawback scheme cannot be denied merely for the reason that application was filed under Rule 6 and not under Rule 7. That was because of the clarification from the Government itself and which is referred to in Para 9.4 of the order passed by the revisional authority. The clarification is aimed at not depriving the exporter of the substantial benefit of reimbursement of duties suffered on inputs used in the manufacture of export products. Thus, the findings of the Commissioner (Appeals) were held to be justified because the respondent assessee did not make any misdeclaration or suppressed the material facts. The findings of the Commissioner (Appeals) have also been confirmed in the light of the policies and which aim at encouraging exports. In the circumstances, the order of the revisional authority cannot be termed as perverse or vitiated by any error of law, apparent on the face of the record. There is no material irregularity and which could be termed as resulting in manifest injustice. In view of this conclusion, the writ petition has no merits and it is dismissed. No costs."*

Government notes that the Hon'ble High Court in the above decision has endorsed the view that in such situations the exporter is eligible to claim Brand Rate of fixation of Duty Drawback under Rule 6 of the DBK Rules, 2017. Further, given the above, Government finds the submission of the Department that there was no explicit observation by the Hon'ble High Court, that in such cases Drawback would be available under Rule 6 of the DBK Rules, 2017, to be incorrect.

8. Government has examined the decision of the Apex Court in the case of Chemicals and Fibres of India Limited vs UOI dated 11.02.1991 cited by the respondent in support of their case. Government finds that the issue involved therein was different inasmuch as, despite the exported product being notified in the AIR, the applicant had sought to obtain Drawback of the arithmetical equivalent of the Customs and Central Excise duties suffered by the inputs. Government notes that the facts of the cited case is different from the one on hand, as the present case involves an exporter availing the benefit of Advance Authorization and hence utilizing inputs obtained duty free and also inputs on which duty was paid. Thus, Government finds that the case cited by the respondent Department will not have any application to the present case. Further, Government also notes that the Commissioner (Appeals) has in a

subsequent decision dated 28.09.2021, in the case of the applicant themselves, held the issue in favour of the applicant. In view of the above, Government annuls the subject Order-in-Appeal dated 28.09.2021 and holds that, in the present case, the applicant will be eligible to claim Brand Rate of Duty Drawback as claimed by them.

9. The subject Revision Application is allowed.

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

ORDER No. 822/2023-CUS(WZ) /ASRA/Mumbai dated 06.11.2023.

To,

M/s General Motors India Private Limited,
Plot No.A-16, MIDC, Talegaon Industrial Area,
Phase – II, Expansion, Tahsil – Maval,
Pune – 410 507.

Copy to:

1. Commissioner of Customs (Export), Zone – I, New Custom House, Ballard Estate, Mumbai – 400 001.
2. Commissioner of Customs (Appeals), Mumbai – I, 2nd floor, New Custom House, Ballard Estate, Mumbai – 400 001.
3. M/s V. Lakshmikumaran & Others, 2nd floor, B & C Wing, Cnergy IT Park, Appa Saheb Marathe Marg, Prabhadevi, Mumbai – 400 025.
4. Sr. P.S. to AS (RA), Mumbai.
5. Notice Board.