REGISTERED SPEED POST AD

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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. 195/146/2015-RA / 8991 Date of Issue: 05.09.2022

ORDER NO. 828 /2022-CX(WZ)/ASRA/MUMBAI DATED 29.8.2022 OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 35EE OF THE CENTRAL EXCISE ACT, 1944.

Applicant : M/s ZF India Pvt. Ltd.
B-38, Chakan Industrial Area,
Phase-II, Village Vasuli,
Chakan, Tal. Khed,
Dist. Pune 410 501

Respondent : Commissioner of Central Excise, Pune-I

Subject : Revision Application filed under Section 35EE of the Central Excise Act, 1944 against Order-in-Appeal No. PUN-EXCUS-001-APP-226-14-15 dated 11.03.2015 passed by the Commissioner of Central Excise(Appeals), Pune-I.

ORDER

The revision application has been filed by M/s ZF India Pvt. Ltd., B-38, Chakan Industrial Area, Phase-II, Village Vasuli, Chakan, Tal. Khed, Dist. Pune – 410 501(hereinafter referred to as "the applicant") against Order-in-Appeal No. PUN-EXCUS-001-APP-226-14-15 dated 11.03.2015 passed by the Commissioner of Central Excise(Appeals), Pune-I.

2. The applicant is engaged in the manufacture of M.V. parts. They had filed two rebate claims of Rs. 32,87,546/- and Rs. 30,99,657/- under Rule 18 of the CER, 2002. The said rebate claims were in respect of duty paid on capital goods removed under Rule 3(5A) of the CCR, 2004. The goods had been removed under ARE-1's and had been supplied to a SEZ Unit; viz. M/s ZF Wind Power Coimbatore Ltd. it appeared that the applicant had cleared the goods without determining the correct assessable value of the goods as required under Rule 3(5A) of the CCR, 2004. After following due process, the rebate claims were rejected by the Deputy Commissioner, Central Excise, Pune-V Division, Pune-I Commissionerate vide OIO No. PI/CEX/Divn.V/57/2013 dated 14.11.2013 dated 14.11.2013.

3.1 Aggrieved by the order dated 14.11.2013 rejecting their rebate claims, the applicant filed appeal before the Commissioner(Appeals). The Commissioner(Appeals) did not find any documentary evidence on record establishing that the goods were cleared after installation and after being used by the applicant. Therefore, it was not possible to determine as to whether the transaction would be covered under Rule 3(5) or Rule 3(5A) of the CCR, 2004. He further averred that even if the transaction was covered under Rule 3(5A) of the CCR, 2004 as claimed by the applicant, it was not enough to state that the transaction value/invoice value of the goods was higher than the book value of the goods. He further stated that the proviso to Rule 3(5A)(b) of the CCR, 2004 stipulates that if the amount calculated by the straight line method @ 2.5% for each quarter is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on the transaction value. The Commissioner(Appeals) opined that for determining the amount payable

under Rule 3(5A) of the CCR, 2004, it was imperative that the calculation by straight line method is also done so that the same can be compared with the duty payable on the transaction value whereas in the present case the applicant has not submitted the duty calculation following the linear calculation method in support of their claim that the transaction value in this case is higher.

3.2 The Commissioner(Appeals) found that the comparison of the book value of the goods against the transaction value had no relevance for Rule 3(5A) of the CCR, 2004. He averred that the applicants had failed on both counts; i.e. in establishing that the impugned goods had been cleared to their sister concern after being put to use thereby making Rule 3(5A) of the CCR, 2004 applicable and in establishing that the transaction value was higher than the calculation of CENVAT credit amount by linear calculation method. With regard to the contention of the applicant that they had paid duty on the transaction value declared in ARE-1 and commercial invoice vis-a-vis excise invoice and since the payment of duty is not in dispute, they are entitled to the rebate claim and that they had submitted CA certificate supporting the correctness of the transaction value at which the goods were sold to their sister concern in addition to the copy of the agreement between the two units and the CENVAT credit account evidencing reversal of the CENVAT credit availed on the said goods, the Commissioner(Appeals) found that these documents were not sufficient to establish that the goods had been cleared after being used and the invoice value at which the goods were sold to the SEZ units was higher as compared to the CENVAT credit calculated @ 2.5% per quarter as stipulated under Rule 3(5A) of the CCR, 2004. He found that the applicant had failed to establish the correctness of the duty paid on the impugned goods cleared under claim for rebate. In view of these findings, the Commissioner(Appeals) vide his OIA No. PUN-EXCUS-001-APP-226-14-15 dated 11.03.2015 upheld the OIO dated 14.11.2013 passed by the Deputy Commissioner, Central Excise, Pune-V Division, Pune-I Commissionerate.

4. The applicant has now filed revision application against the OIA No. PUN-EXCUS-001-APP-226-14-15 dated 11.03.2015 on the following grounds :

(a) The capital goods cleared to the purchaser located in SEZ is deemed export and rebate is admissible in view of the order dated 04.06.2013 passed by the Revisionary Authority in the case of Gujarat Organics Ltd.[2015(3) TMI 1040]. The applicant submitted that the decision of the Revisionary Authority in the case of Positive Packaging Industries Ltd.[2012(282)ELT 137(GOI)] held that substantive benefits like rebate should not be denied specifically when there are no such exceptions or categorical bar stipulated in Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the CER, 2004.

(b) The only ground on which the rebate claims had been denied by the Deputy Commissioner of Central Excise and the said order had been sustained by the Commissioner(Appeals) was that the Department was unable to verify whether the payment of duty made by the applicant on the removal of capital goods to the purchaser located in SEZ is in conformity with Rule 3(5A) of the CCR, 2004. The applicant stated that the lower authorities had committed an error by holding that the applicant had failed to establish that the capital goods cleared to the Unit in SEZ was cleared after being put to use and that the payment of duty made by the applicant was in accordance with the provisions of sub-rule (5A) of Rule 3 of the CCR, 2004.

(c) The applicant submitted that both the lower authorities had failed to appreciate that the applicant had produced invoices of indigenous purchases and bills of entry for imported capital goods which were cleared to the purchaser located in SEZ. Moreover, the correctness of the invoices/bills of entry under which the capital goods had been originally purchased/imported by the applicant had not been disputed by the lower authorities. It was stated that it can be seen from the duty paying documents that the capital goods cleared by the applicant were purchased or imported in the year 2009-2010. The duty paying

documents produced by them clearly showed that they had cleared capital goods which had been put to use and the duty paid on such capital goods was availed by the applicant as credit at the time of receipt/installation thereof.

(d) It was further stated that they had produced CA certificate in support of their contention that the transaction value declared in the ARE-1 was correct, that the Commissioner(Appeals) had erred by not accepting the said certificate, by not accepting the contention of the applicant that the duty had correctly been paid and required to be rebated.

(e) Without prejudice to their other submissions, the applicant submitted that admittedly no proceedings had been initiated by the proper officer having jurisdiction over the factory of the applicant that the capital goods were removed by them without complying with the provisions of Rule 3(5A) of the CCR, 2004. The assessment of the duty paid on capital goods had not been disputed and in the absence of any dispute by the assessing officer, the rebate sanctioning authority could not have rejected the rebate claim on the ground that duty is not paid consistent with Rule 3(5A) of the CCR, 2004. The proper officer having jurisdiction over the factory of the applicant had not disputed the correctness of the duty paid by the applicant on the capital goods removed to their purchaser located in SEZ. Therefore, the assessment made by the applicant had become final by not taking any proceedings known in law to set aside the said assessment.

(f) The applicant placed reliance upon the judgment of the Hon'ble Tribunal in the case of Glass and Ceramic Decorators vs. CCE, Mumbai-I[2014(305)ELT 133] and the decision of the Revisionary Authority in the case of Miraj Power Services vs. CCE, Mumbai-II[2015(3)TMI 779-GOI] and submitted that the rejection of the rebate claims was without any basis and purely based on assumptions.

5. The applicant was granted a personal hearing on 14.09.2021. Shri Mihir Mehta, Advocate and Shri Sandeep Kolekar, Authorised Signatory of

the applicant appeared online on behalf of the applicant and reiterated their earlier submissions. They also submitted a compilation of a few judgments. They further stated that the transaction value of the goods being higher than the value by straight line calculation method, their rebate claim should have not been rejected. The applicant also filed written submissions after personal hearing on 22.09.2021.

6.1 While reiterating their earlier submissions, the applicant stated that in the Chartered Engineers certificate submitted alongwith the appeal filed before the Commissioner(Appeals) and placed at page 386 of the revision application, photographs have been enclosed to substantiate that the capital goods were installed in the factory of the applicant at Pune. The applicant further stated that at the time of transfer of the capital goods to ZF Wind, they had appointed a Chartered Engineer to compute the transaction value on the basis of the expected residual life, the realisable market revenue etc. for each of the assets transferred. The said value arrived at by the Chartered Engineer was mentioned in the Annexure to the Asset Transfer Agreement as the transaction value for the transfer of assets to ZF Wind. The details of the original purchase price, amount arrived as per Rule 3(5A) of the CCR, 2004, the transaction value in terms of the proviso to Rule 3(5A) of the CCR, 2004 and the duty paid thereon was detailed in a table.

Sr. No.	Particulars	Amount(₹)
1	Original purchase price of the imported/indigenous capital goods	5,46,72,272/-
2	Amount in terms of Rule 3(5A) of the CCR, 2004 after considering the reduction at the rate of 2.5% per quarter	47,04,352/-
3	Transaction value in terms of proviso to Rule 3(5A) of the CCR, 2004	4,60,57,864/-
4	Duty paid on the transaction value	63,87,203/-

6.2 The applicant further stated that they had submitted relevant records of the original purchase invoices, asset transfer agreement, Chartered Engineers Certificate before the lower authorities who had completely ignored these documents. It would be obvious from the perusal of the invoices and other documents submitted that the transaction value for

transfer of assets was more than the value arrived at in terms of Rule 3(5A) of the CCR, 2004 after considering the reduction of 2.5% per quarter. It was also averred that even if the lower authorities were not inclined to grant the rebate/refund of credit reversed on the transaction value, then basis the documents submitted by them, they could have computed the amount of refund/rebate due and sanctioned the same. The applicant asserted that since the capital goods were cleared to ZF Wind which is a SEZ unit, they could have cleared the goods without payment of duty under Rule 19 of the CER, 2002 and hence the applicant was entitled to the re-credit of the amount reversed/duty paid. It was further submitted that the applicant was eligible for re-credit of the amount of duty paid and such amount should be refunded to the applicant in cash in terms of Section 142(7) and/or Section 142(3) of the CGST Act.

6.3 The applicant further asserted that the lower authorities had adopted a pedantic and hyper technical approach for rejecting the rebate claim filed by them and such a stand defeats the very purpose of a benevolent legislation allowing rebate of duty paid on the export of goods; i.e. clearance to an SEZ unit. In this regard, the applicant placed reliance upon the judgment in the case of Kosmos Healthcare Pvt. Ltd. vs. Asst. Commr. of C. Ex., Kolkata-I[2013(297)ELT 345(Cal.)]. The applicant lastly stated that the denial of the rebate of duty paid on the goods cleared to SEZ unit by them would tantamount to export of taxes which was not the intention of the Government and that rebate cannot be denied for non-compliance of procedural conditions.

7. Government has carefully gone through the impugned OIA, the OIO, the revision application filed by the applicant, their written submissions and their oral submissions at the time of personal hearing. The applicant in the present case had cleared capital goods to another unit in a SEZ after reversing an amount equal to the duty leviable on the transaction value of the goods in terms of the proviso to Rule 3(5A) of the CCR, 2004 and claimed rebate of such amount. The lower authorities had rejected the rebate claims on the ground that the applicant had not established that the

capital goods had been installed and used in the factory and that they had not disclosed the residual amount equal to CENVAT credit availed by them on the capital goods after reducing it by 2.5% for each quarter from the date of taking credit to enable the Department to confirm that it was indeed lesser than the duty payable on the transaction value of the capital goods. The applicant has contended that they have correctly worked out the amount as equal to the duty payable on the transaction value.

8.1 Since the sub-rules (5) and (5A) of Rule 3 of the CCR, 2004 lie at the crux of the issue, the text thereof is reproduced for better appreciation of its ambit.

> "(5) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output service, the manufacturer of the final products or provider of output service, as the case may be, shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in rule 9 :
>
> **Provided** that such payment shall not be required to be made where any inputs or capital goods are removed outside the premises of the provider of output service for providing the output service :
>
> **Provided** further that such payment shall not be required to be made where any inputs are removed outside the factory for providing free warranty for final products :
>
> (5A) (a) If the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely : -
>
> (i) for computers and computer peripherals :
>
> | |
> |---|
> | for each quarter in the first year @ 10% |
> | for each quarter in the second year @ 8% |
> | for each quarter in the third year @ 5% |
> | for each quarter in the fourth and fifth year @ 1% |
>
> (ii) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter :
> **Provided** that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on the transaction value."

8.2 Government observes that there are three different possibilities that Rule 3(5) and Rule 3(5A)(ii) of the CCR, 2004 envisage; viz. (i) CENVAT credit has been taken but the capital goods are removed as such; (ii) the capital goods have been put to use and the amount has been arrived at after reducing the CENVAT credit taken by 2.5% for each quarter from the date of taking CENVAT credit and this amount is greater than the duty leviable on the transaction value of the capital goods being cleared; and (iii) The capital goods have been put to use and the amount has been arrived at after reducing the CENVAT credit taken by 2.5% for each quarter from the date of taking CENVAT credit and this amount is lesser than the duty leviable on the transaction value of the capital goods being cleared.

9.1 In the present case, the applicants stand is that the capital goods have been cleared for export after being put to use and that the duty leviable on the transaction value of those capital goods is greater than the amount arrived at after reducing the CENVAT credit taken by 2.5% for each quarter from the date of taking CENVAT credit. Before going into the merits, it would be interesting to understand the possibilities that could arise in terms of the scenarios suggested by the Department while rejecting the rebate claims. It is observed that the applicant has made out some arguments in the revision application on the basis of a certificate issued by a Chartered Engineer that the capital goods have indeed been installed in their factory. It is also not the Departments case that the amount paid on the transaction value is greater than the CENVAT credit availed on the capital goods. However, the hypothesis that emerges if the applicant has actually not put the capital goods to use is that, in terms of Rule 3(5) of the CCR, 2004 the applicant was required to pay an amount equal to the credit availed at the time of clearance of the exported goods. In such circumstances, the applicant would have been required to pay the full amount of CENVAT credit by reversal and would have claimed a higher amount as rebate. The other prospect is that the capital goods have been put to use but the amount arrived at in terms of Rule 3(5A)(ii) of the CCR, 2004 after reducing the CENVAT credit taken for each quarter from the date of taking CENVAT credit is greater than the duty

leviable on the transaction value of the capital goods being cleared. Here again the applicant would have claimed a higher amount as rebate.

9.2 In both these situations, the applicant would have been eligible for more rebate. In the normal course, the Department seeks to deny or restrict rebate claims where the applicant appears to be claiming rebate on the higher side and attempts to curtail such excessive claims. In the present case, the stand of the Department vis-à-vis the provisions of Rule 3 of the CCR, 2004 would increase the rebatable amount if the capital goods have not been put to use or if the CENVAT credit amount arrived at after reducing the CENVAT credit availed by 2.5% for each quarter of the year of the capital goods being in use is higher than the transaction value on sale thereof. If the applicant has utilised CENVAT credit for payment of the amount on clearance of capital goods, it would mean that the applicant would be entitled to encash more of their CENVAT credit.

9.3 The irony here is that the proviso to Rule 3(5A)(ii) of the CCR, 2004 has been instituted to ensure that the revenue interest is protected. This proviso has been inserted to prevent a situation where the assessee pays an amount calculated after reducing the CENVAT credit taken by 2.5% for each quarter and sells the capital goods at a price for which the duty leviable on the goods cleared is higher than the amount payable after reducing the CENVAT credit availed by 2.5% for each quarter. In such a situation, the proviso to Rule 3(5A)(ii) of the CCR, 2004 secures the duty payable on the higher transaction value and the revenue interest is protected. Moreover, the issues being raised concern the valuation of the capital goods which have been cleared for export and these issues are being raised at the stage of rebate claims filed by the applicant. The available records do not mention any action taken/SCN issued by the jurisdictional authorities disputing the valuation of the capital goods. The Department has also not filed any cross-objection in reply to the Notice dated 16.06.2015 issued under Section 35EE of the CEA, 1944 forwarding copy of the revision application filed by the applicant. The Department has also not attended personal hearings on the appointed dates to counter the claims made by the applicant in these

proceedings. Considering these facts, the applicants submission that there is no challenge to the assessment of the capital goods has to be admitted. The rebate sanctioning authority cannot assume the jurisdiction of the proper officer; viz. the Range Superintendent. Therefore, the rejection of the rebate claims filed by the applicant on the basis of the valuation of the capital goods cleared for export where the assessment of these goods has been accepted as proper by the assessing Range Officer cannot be sustained.

10. The applicant has also made out some grounds about being entitled to clear the capital goods without payment of duty under Rule 19 of the CER, 2002 to the SEZ unit and that they be granted re-credit of the amount reversed/duties paid. They have further requested that the amount allowed as re-credit be refunded to them in cash in terms of Section 142 of the CGST Act. Government is of the view that these submissions do not warrant discussion as the rebate claims have been found to be admissible on merits.

11. In the light of the findings recorded hereinbefore, Government sets aside the OIA No. PUN-EXCUS-001-APP-226-14-15 dated 11.03.2015. The revision application filed by the applicant is allowed.

Shrawan 29/08/22

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

ORDER No. 828 /2022-CX(WZ) /ASRA/Mumbai DATED 29.8.22

To,
M/s ZF India Pvt. Ltd.
B-38, Chakan Industrial Area,
Phase-II, Village Vasuli,
Chakan, Tal. Khed,
Dist. Pune 410 501

Copy to:

1) The Commissioner of CGST & Central Excise, Pune-I
2) The Commissioner of Central Excise(Appeals), Pune-I
3) Mr. Mihir Mehta, Advocate, PDS Legal, 23/24, Mittal Chambers, 2nd Floor, Nariman Point, Mumbai – 400021.
4) Sr. P.S. to AS (RA), Mumbai
5) Guard file