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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. 371/250-300/DBK/2019

740

Date of Issue: 06.02.2023

87-137  
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 : M/s.Nayara Energy Limited,  
(Formerly known as M/s Essar Oil Limited)  
P.O. Box 24, Head Post Office,  
Jam Khambhaliya, Dist. Jamnagar,  
Dwarka - 361305.

Applicant : Commissioner of Customs (Preventive),  
Jamnagar.

Subject : Revision Applications filed under Section 129DD of the  
Customs Act, 1962 against the Order-in-Appeal No.RAJ-  
EXCUS-000-APP-040-090-2109 dated 30.04.2019 passed  
by the Principal Commissioner (Appeals), CGST &  
Central Excise, Rajkot.



**ORDER**

These Revision Applications have been filed M/s Nayara Energy Limited, formerly known as Essar Oil Limited (here-in-after referred to as 'the applicant') against the Order-in-Appeal No. RAJ-EXCUS-000-APP-040-090-2109 dated 30.04.2019 passed by the Principal Commissioner (Appeals), CGST & Central Excise, Rajkot. The said Order-in-Appeal decided appeals filed by the applicant against 51 Orders passed by the Additional Commissioner, Customs & Central Excise, Rajkot Commissionerate.

2. Brief facts of the case are that the applicant filed several 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) in respect of the goods exported by them. The original adjudicating authority vide the above referred 51 Orders/Letters held that the duty incidence on account of National Calamity Contingent Duty (NCCD) of Customs cannot be considered for computing brand rate eligibility, as NCCD was leviable upon importation of crude oil under Section 134 of the Finance Act, 2003 and the same was not specified for fixation of brand rate.

3. Aggrieved, the applicant filed appeals before the Commissioner (Appeals) against the said 51 Orders/Letters of the Additional Commissioner. The Commissioner (Appeals) vide the impugned Order-in-Appeal upheld the said Orders of the original Adjudicating Authority and rejected the appeals of the applicant.

4.1 Aggrieved by the impugned Order-in-Appeal dated 30.04.2019, the applicant has filed the present Revision Applications. The same have been preferred on the following grounds:-

(a) The appellate authority had erred in holding that NCCD is not a duty of Customs and also that the ratio of the Supreme Court judgment in the case of *Baja Auto vs UOI* [2019-TIOL-127-SC-CX] was not applicable to the instant case;



(b) The Commissioner (Appeals) lost sight of the fact that NCCD was a duty of Customs and that all the provisions of the Customs Act and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties and imposition of penalties applied to the levy and collection of NCCD; that a plain reading of Section 134 of the Finance Act, 2003 indicates that NCCD was leviable as a duty of Customs;

(c) In terms of Section 12 of the Customs Act, 1962 Customs duty could be levied not only under the Customs Act, 1962 but also under any other law which was in force; that a reading of Section 12 of the Customs Act, 1962 with Section 2 of the Customs Tariff Act, 1975 (CTA), makes it clear that the said provisions provide for the levy of Basic Customs Duty on the goods imported into India, the rates of which are specified in the First and Second Schedules of the CTA; that the first part of Section 12 of the Customs Act, 1962 provides for levy of Basic Customs Duty in terms of the Customs Act, 1962; and that the second part of Section 12 of the Customs Act, 1962 provides for levy of duties of Customs under any other law in force; and that it was this part which was not dealt with by the Commissioner (Appeals);

(d) Section 3(8) of the CTA refers to the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, including those inter-alia relating to drawback of the duties of customs chargeable under Section 3 of the CTA;

(e) That the provisions of the Customs Act, 1962 applies to both - Education Cess and Secondary and Higher Education Cess, which were leviable under the Finance Act, 2004 & Finance Act, 2007, respectively, which attracted the provisions of the Customs Act, 1962 and the rules and regulations made thereunder, and were hence duties of Customs for the purpose of drawback under Section 75 of the Customs Act, 1962 and for Brand Rate fixation under Rule 6 of the Drawback Rules;

(f) That NCCD is levied as a duty of Customs by virtue of Section 134 of the Finance Act, 2003 and similarly attracts the provisions of the Customs Act, 1962 and the rules made thereunder; and hence NCCD was levied in terms of the Finance Act, 2003;



(g) The Board vide several circulars had clarified that duties levied in terms of the CTA are includable in the computation of drawback; that the rationale behind the levy does not decide the nature of levy and that the Commissioner (Appeals) had erred in going into the rationale to decide that the same cannot be factored in the brand rate of drawback; and

(h) That it was a settled law that no duties should be exported;

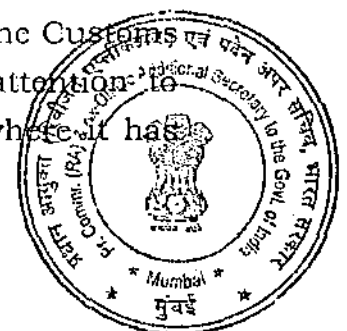
4.2 Further, the applicant vide their letter dated 09.12.2021 submitted that :-

a) The issue in dispute had been settled by the Hon'ble Gujarat High Court in their case itself – Commissioner of Customs vs Nayara Energy Ltd [2020 (373) ELT 353 (Guj)], wherein it was held that NCCD is a duty of Customs as the same had been described as “as a duty of Customs” under sub-section (1) of Section 134 of the Finance Act, 2003 and that the duty incidence on account of NCCD had to be considered for computing brand rate and that drawback of NCCD can only be claimed under an application for brand rate under Rule 6 or Rule 7 of the Drawback Rules; and

b) The Board vide Instruction no.5/2020-Customs dated 12.05.2020 had clarified that the incidence of NCCD where applicable, was required to be factored in calculation of Brand rate of duty drawback.

In light of the above submissions, they prayed that the impugned Order-in-Appeal be set aside and directions be issued that NCCD should be factored in for computing the brand rate of drawback.

5. Personal hearing in the matter was granted to the applicant on 30.11.2021 and Shri Karan Sarawagi and Shri Devang Mankad, both Advocates, appeared online on behalf of the applicant and submitted that NCCD is a duty of Customs. They submitted that Section 12 of the Customs Act, 1962 was wide enough to include NCCD. They drew attention to Instruction No.5/2020 dated 12.05.2020 issued by the CBIC which has



been clarified that NCCD is a duty of Customs and has to be considered for brand rate fixation.

6. Government has carefully gone through the relevant case records available in the case file, the written and oral submissions and also perused the Orders/Letters of the Additional Commissioner and the impugned Order-in-Appeal dated 30.04.2019.

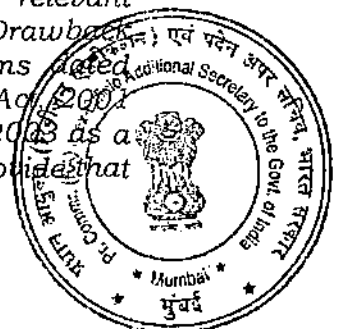
7. Government notes that the issue involved in all the cases under challenge is whether the incidence of NCCD paid on the imported inputs used in the manufacture of goods which were exported by the applicant, can be included for calculating the Brand Rate of duty Drawback. Government notes that the original Adjudicating Authority had held that the incidence of NCCD cannot be factored for fixation of brand rate of duty Drawback and this decision was upheld by the Commissioner (Appeals) vide the impugned Order-in-Appeal. 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, 2003 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.

8. Further, Government finds that the Hon'ble High Court of Gujarat in the case of the applicant itself, viz., *Commissioner of Customs vs Nayara Energy Ltd* [2020 (373) ELT 353 (Guj)], had held that NCCD is a duty of Customs under sub-section (1) of Section 134 of the Finance Act, 2003 and that the duty incidence on account of NCCD has to be considered for computing brand rate of drawback. In view of the above, Government finds that the issue is settled by the Board vide its above-mentioned Instruction and the Order of the Hon'ble High Court cited above. In the event, the impugned Order-in-Appeal holding a contra view will not survive and deserves to be annulled and Government accordingly hold so.



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

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

  
30/11/23  
(SHRAWAN KUMAR)

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

ORDER No. 87-137/2023-CUS (WZ) /ASRA/Mumbai dated 30.01.2023

To,

M/s Nayara Energy Limited, (Formerly known as Essar Oil Limited)  
P.O. Box 24, Head Post Office, Jam Khambhalia,  
Dist. Jamnagar, Dwarka - 361305.

Copy to:

1. The Commissioner of Customs (Preventive), Jamnagar.
2. The Commissioner (Appeals), Customs & Central Excise, Rajkot, 2<sup>nd</sup> floor, GST Bhavan, Race Course Ring Road, Rajkot - 360 001.
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.

