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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.195/153/15-RA/11443

Date of issue: 04.10.2022

ORDER NO. ⁸⁸⁶ /2022-CX (WZ)/ASRA/MUMBAI DATED 28.09.2022
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. Watson Pharma Pvt. Ltd.

Respondent : Commissioner, Central Excise, Raigad

Subject : Revision Application filed, under Section 35EE of the
Central Excise Act, 1944 against the Order-in-Appeal No.
US/446/RGD/2012 dated 12.07.2012 passed by the
Commissioner (Appeals-II), Central Excise, Mumbai.

ORDER

This Revision Application is filed by the M/s. Watson Pharma Pvt. Ltd., 21-22, Kalpataru Square, Kondivita Lane, Off Andheri-Kurla Road, Andheri(East), Mumbai - 400 059(hereinafter referred to as "the Applicant") against the Order-in-Appeal (OIA) No. US/446/RGD/2012 dated 12.07.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai.

2. Brief facts of the case are that the applicant had filed four rebate claims totally amounting to Rs.14,46,120/- under Notification No.19/2004-CE(N.T.) dated 06.09.2004 issued under Rule18 of the Central Excise Rules,2002. The claims were rejected by the rebate sanctioning authority vide Order-in-Original (OIO) No. 1146/11-12/DC(Rebate)/Raigad dated 02.11.2011 on the grounds that the value of export goods appearing in the excise invoice, ARE-1 and the Shipping Bill are different. Aggrieved, the applicant filed an appeal. However, the Commissioner (Appeals) upheld the OIO and rejected the appeal vide the impugned OIA.

3. Hence, the applicant has filed the impugned Revision Application mainly on the grounds that:

- a) It is submitted that there is no dispute that the manufacturer exporter has paid the duty and the goods were exported. The para no.3 of the Board Instruction No. 510/06/2000-CX dated 03-02-2000 clearly states that the Maritime Commissioner should sanction the complete rebate even though the duty has been paid in excess.
- b) It is submitted that price of Stock Transfer represent the value of goods under Rule 7 of Valuation Rules- The stock transferred goods were exported at price contracted with the foreign customer- The contracted price was based on market forces- Since price had reduced substantially the FOB value was lower than the value at which stock was transferred. Hence rebate should be granted.

- c) It is submitted that duty has been paid by applicant on the assessable value indicated in the invoice, which is proper. The value indicated in the shipping bills is for customs purpose and not for payment of excise duty. The clarification is given in para 4.1 of Chapter 8 of CBEC's Excise Manual of Supplementary Instructions, reproduced as below:

"4.1 The exporter is required to prepare five copies of application in the Form ARE-1, as per format specified in the Annexure-14 to Notification No.19/2004-Central Excise (N.T.), dated 06.09.2004 (See Part-7). The goods shall be assessed to duty in the same manner as the goods for home consumption. The classification and rate of duty should be in terms of Central Excise Tariff Act, 1985 read with any exemption notification and / or Central Excise Rules, 2002, the value shall be the "transaction value" and should conform to Section 4 or Section 4A, as the case may be, of the Central Excise Act, 1944. It is clarified that this value may be less than equal to or more than the F.O.B. value indicated by the exporter on the Shipping Bill."

- d) It is submitted that if the said excess amount is denied as rebate, then that means same was not liable to include in the assessable value and therefore duty was no liable to be paid on the same. In the case of Sri Bhagirath Textiles Ltd. 2006 (202 ELT 147 (GO)) the GOI has permitted to the respondents to take back the cenvat credit which is related to central excise duty paid on CIF value of the impugned goods.
- e) The applicant had made a detailed submission in the appeal to state that the applicant was eligible for rebate claim. The applicant had also attached invoice of export made from Dombivli to substantiate valuation as per Rule 7 of Valuation Rules. The order passed by the commissioner has not given any finding on the submissions made by the applicant. The order has merely stated that the applicant has not substantiated the manner of valuation of goods and hence rebate has been denied.

4. Several personal hearing opportunities were given to the applicant viz. 12.08.2021, 20.08.2021, 15.12.2021, and 21.12.2021. However, the applicant did not attend on any date nor have they sent any written communication.

4.1 Since sufficient opportunities have already been given in the matter, the same is therefore taken up for decision based on available records.

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

6. Government observes that the main issue in the instant case is whether due to different value of the goods in the export documents such as excise invoice, ARE-1 and Shipping Bill, a rebate claim can be rejected?

7.1 Government observes that in the instant case as the applicant had sold their factory situated at Dombivli, the closing stock of goods lying therein was transferred to their godown at Ambernath, under invoice No. 1147, 1149 both dated 30.12.2008 and 1160 dated 01.01.2009 on payment of applicable Central Excise duty. Subsequently they exported goods from this stock under export documents including an application for removal of duty paid goods from outside the place of manufacturing to the jurisdictional Range authorities alongwith ARE-1 application and godown invoice.

7.2 Government observes that in the instant case the lower authorities have not disputed the duty paid character of the goods exported or compliance of any prescribed procedure for export or submission of documents for claiming rebate as stipulated in the law. The rebate claims of the applicant were rejected as the value of goods exported were different in excise invoice, ARE-1 and Shipping bill as apparent from the following table:

(Amount in Rs.)

RC No./Date	Excise Inv. No./Date	AV as per Excise Inv	Value as per ARE-1	FOB value as per S/B	Claim amt
7950/20.07.09	1160/01.01.09	18,00,000	14,59,331	14,77,349	1,85,400
7951/20.07.09	1160/01.01.09	12,00,000	10,88,190	10,97,760	1,23,600
7956/20.07.09	1147/30.12.08	96,00,000	46,20,146	44,51,634	9,88,800
8711/27.07.09	1149/30.12.08	14,40,000	14,27,420	14,29,920	1,48,320

8.1 Government observes that Section 4 of the Central Excise Act, 1944 defines 'Valuation of excisable goods for purposes of charging of duty of excise'. As per section 4(1)(a) of the Central Excise Act, 1944 - *where duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of said goods, such value shall, -*

(a) *in a case where the goods are sold by the assessee, for delivery at time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value.*

8.2 Government observes that the word 'transaction value' has been defined in Section 4(3)(d) of the Central Excise Act, 1944, which reads as follows:

"transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter, but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

8.3 Place of Removal has been defined under Section 4(3)(c) *ibid* as:

- (i) a factory or any other place or premises of production of manufacture of the excisable goods;
- (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
- (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory.

8.4 The Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also relevant in the instant context which is reproduced below:

Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.

Explanation 1. - "Cost of transportation" includes -

- (i) the actual cost of transportation; and
- (ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.

Explanation 2. - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not the place of removal, shall not be excluded for the purpose of determining the value of the excisable goods.

8.5 Government observes that Section 5 of the Central Sales Tax Act, 1956 clarified that in the case of export and import, the sale or purchase of goods shall be deemed to take place in the following manner:-

a sale or purchase of goods shall be deemed to take place in the course of export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of

documents of title to the goods after the goods have crossed the Customs frontiers of India.

8.6 Government notes that para 2(e) of the Notification No. 19/2004-CE(NT) dated 06.09.2004 issued under Rule 18 of the Central Excise Rules, 2002 states as follows:-

"that the market price of the excisable goods at the time of exportation is not less than the amount of rebate of duty claimed;"

9. From perusal of the above provisions, Government observes that the place of removal may be factory, warehouse, depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery. Further, in respect of export goods, place of removal is the place where the documents are presented to the Customs officers and from where the goods leave the territory of India for export and not the factory gate. However, the cost of transportation till the place of delivery is not to be considered for deriving transaction value of the excisable goods and therefore freight charges are to be excluded. Thus, Government concludes that the place of removal in case of export is the port where export documents are presented to the customs officer and all the expenses from factory gate to place of removal shall be included in computation of FOB value and rebate on same is allowable under Rule 18 of Central Excise Rules, 2002.

9.1 In the instant case, Government observes that the FOB value as per Shipping bill is less than the assessable value as per the excise invoice. Therefore, the applicant is eligible for rebate of duty as calculated on FOB value.

10.1 Government observes that the applicant has paid excess amount towards duty liability. Any amount paid in excess of duty liability cannot be treated as central excise duty. But it has to be treated as voluntary deposit with the Government which is to be returned in the manner in which it was

paid. Hon'ble Punjab and Haryana High Court in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI [2009(235) ELT 22(P&H)], has held that:

Rebate/Refund - Mode of payment - Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable - Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty - Petitioner is entitled to cash refund only of the portion deposited by it by actual credit and for remaining portion, refund by way of credit is appropriate.

Thus, the Hon'ble Court has observed that refund in cash of higher duty paid on goods exported is not admissible and that refund of same by way of Cenvat credit is appropriate. Therefore, in the instant case also excess duty paid above the FOB value should be returned to the applicant in the manner in which it was paid by them.

10.2 Government observes that in this regard in a recent judgment, Hon'ble Gujarat High Court in the matter of M/s. Garden Silk Mills [2018 (11) G.S.T.L. 272 (Guj.)] has held as follows:

9. Coming to the merits of the case, again undisputed facts are that the petitioner had paid excise duty on CIF value of goods exported. The petitioner does not dispute the stand of the Government of India that excise duty was payable on FOB value and not on CIF value. The Government of India also does not dispute the petitioner's stand that in such a case the additional amount paid by the petitioner would be in the nature of deposit with the Government which the Government cannot withhold without the authority of law. If these facts are established, a simple corollary thereof would be that the amount has to be returned to the petitioner. If, therefore, the petitioner's request was for re-credit of such amount in Cenvat account, same was perfectly legitimate. The Government of India should not have asked the petitioner to file separate applications for such purpose. The Government of India itself in case of Balkrishna Industries Ltd. (supra), had under substantially similar circumstances, provided as under :

**8. In this regard, Government observes that the revisionary authority has passed a number of orders wherein it has been held that the rebate of duty is to be allowed of the duty paid on the transaction value of the goods as determined under Section 4*

of the Central Excise Act, 1944 and the rebate on the amount of duty paid in respect of post-clearances expenses like freight and insurances may be allowed as recredit entry in their cenvat account. Since the Government cannot retain the amount collected without any authority of law and the same has to be returned to the applicant in the manner it was paid. Hence, Government observes that the applicant is entitled for the take (sic) credit in their cenvat account in respect of the amount paid as duty on freight & insurance charges. The applicant was not even required to make a request with the department for allowing this recredit in their cenvat account. The Adjudicating Officer/Commissioner (Appeals) could have themselves allowed this instead of rejecting the same as time-barred."

10. In the result, the respondents are directed to re-credit the excess amount paid by the petitioner categorising as excise duty of CIF value of the goods to the Cenvat credit account.

11. In view of the findings recorded above, Government sets aside the impugned Order-in-Appeal No. US/446/RGD/2012 dated 12.07.2012 passed by the Commissioner (Appeals-II), Central Excise, Mumbai and partially allows the instant Revision Application to the extent that applicable rebate calculated on the FOB value is permitted and the excess amount paid towards duty, if any, should be returned to the applicant, after due verification, in the manner in which it was paid by them.

Shrawan Kumar
28/9/22

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

ORDER No. 886 /2022-CX (WZ)/ASRA/Mumbai dated 28.09.2022

To,

M/s. Watson Pharma Pvt. Ltd.,
21-22, Kalpataru Square, Kondivita Lane,
Off Andheri-Kurla Road,
Andheri(East), Mumbai - 400 059.

Copy to:

1. Commissioner of CGST, Belapur,
1st Floor, CGO Complex, CED Belapur,
Navi Mumbai - 400 614.
2. Sr. P.S. to AS (RA), Mumbai
3. Guard file
4. Notice Board.