REGISTERED POST
SPEED POST

सत्यमेव जयते

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. 195/23 (I to IV)/2015-RA 1088 Date of Issue: 21.09.2022

ORDER NO. 916-919 /2022-CEX (WZ)/ASRA/MUMBAI DATED 22. 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. Laxmisagar Tradelink Pvt Ltd,
234, Madhav Darshan, Waghwadi Road,
Dist-Bhavnagar

Respondent : The Commissioner of Central Excise, Bhavnagar.

Subject: Revision Application filed under section 35EE of the Central Excise Act, 1944 against the Orders-in-Appeal Nos. BVR-EXCUS-000-APP-44 TO 47-14-15 dated 17.11.2014 passed by the Commissioner of Central Excise (Appeals) Ahmedabad (for Rajkot (Appeals) Unit).

ORDER

This Revision Application is filed by M/s. Laxmisagar Tradelink Pvt Ltd, 234, Madhav Darshan, Waghwadi Road, Dist-Bhavnagar (hereinafter referred to as "the applicant") against the Orders-in-Appeal Nos. BVR-EXCUS-000-APP-44 TO 47-14-15 dated 17.11.2014 passed by the Commissioner of Central Excise (Appeals) Ahmedabad (for Rajkot (Appeals) Unit).

2. Brief facts of the case are that the applicant is merchant exporter and had filed rebate claims for goods procured from various 'ship breakers' and exported by the applicant. In two cases the refund claim was sanctioned in full in cash by the adjudicating authority irrespective of the FOB value and subsequently show cause notices were issued to the applicant under Section 11A (1) of the Central Excise Act, 1944 for recovery of amount erroneously refunded alongwith interest under Section 11AA of the Act for recovery of excess amount paid in cash. In two other cases, the adjudicating authority sanctioned the claim to the extent of the duty on FOB value and on the differential amount of the assessable value and FOB, the duty paid was restored in the cenvat account of the manufacturers. The adjudicating authority after following the due process of law issued the orders-in-original as under

Sr No	Order in Original No. and date	Show cause notice No and date	Amount recoverable/rejected in OIO (Rs)	Remarks
1	11 to 14/AC/ RURAL/BVR/2013-14 dated 28.02.2014	V.73/03-17/D/Rural/ 11-12 dated 18.06.2012	1,65,644	OIO pursuant to issue of SCN
		V.73/03-4/D/Rural/ 12-13 dated 13.09.2012	58,145/-	OIO pursuant to issue of SCN
		V.73/03-1/D/Rural/ 12-13 dated 18.06.2012	4,89,334/-	OIO pursuant to issue of SCN
		V.73/03-05/D/Rural/ 13-14 dated 19.09.2013	2,46,680/-	OIO pursuant to issue of SCN

2	15/AC/RURAL/BVR/2013-14 dated 28.02.2014	V.72/03-13/D/Rural/ 12-13 dated 09.01.2013	2,15,698/-	OIO pursuant to issue of SCN
3	01/AC/RURAL/BVR/JSD/ REBATE / 14-15 dated 16.04.2014	--	6,363/-	Refund Order
4	23/AC/RURAL/BVR/14-15 dated 12.06.2014	--	15,695/-	Refund order

2.1 The OIO's at Sr. No 1 and 2 above pertained to show cause notices issued to the applicant for recovery of erroneous rebate in cash and the OIO's at Sr. No 3 and 4 pertained to sanction of rebate claims filed by the applicant.

3. Aggrieved by the said Orders-in-Original, the applicant filed appeals before the Commissioner (Appeals-III), Central Excise, Ahmedabad (for Rajkot (Appeals) Unit. The Appellate Authority vide Orders-in-Appeals Nos BVR-EXCUS-000-APP-44 TO 47-14-15 dated 17.11.2014 rejected the appeals. The Appellate Authority while rejecting the appeals made the following observations

3.1. That other Orders-in-Appeal Nos 62 to 70/2011/Comm(A)/RBT/RAJ dated 17.10.2011 issued in respect of the applicant and relied upon by them was challenged by the department by way of filing revision application before Jt. Secy (R.A) New Delhi, who vide Order No 1305-1313/13-CX dated 10.10.2013 decided the issue in favour of the Department;

3.2 That the case law of M/s Orchid Healthcare [2013(290) E.L.T. 504((Mad)] and M/s Suncity Alloys Pvt Ltd [2007(218) E.L.T (Raj.)] relied upon by the applicant were not applicable to the facts of the instant appeals to the extent that here were equal foreign exchange realizations therein i.e the export proceeds were in consonance with the values at which the goods were cleared from the manufacturing premises and both those cases were related to the duty payments on exempted goods for which the claims were not sanctioned which was not the issue in the instant case;

3.3 that as regards the case law of M/s Maini Precision Products Pvt Ltd [2010(253) E.L.T. 409(Tri. Bang)] relied upon by the applicant which largely

followed Board Circular No. 510/6/2000-CX dated 03.02.2000, while deciding a similar matter in the case of M/s Unique Pharma Laboratories [2013(295_ E.L.T. 129) GOI)], it was observed that the circular issued prior to the introduction of transaction value concept introduced under the Central Excise Act, 1944 cannot be strictly applied after 01.07.2000 and cannot supersede provisions of Notification No 19/2004-CE.;

3.4 That in the decision of M/s Unique Pharma Laboratories held that the amount paid in excess of duty liability on one's own volition has to be considered as voluntary deposit which is required to be returned to assessee in the manner in which it was paid and the refund in cash not admissible on such excess duty paid;

3.5 That in the case of M/s Cadila Healthcare Ltd.[2013(288) ELT133(G.O.I.)] and M/s Panacea Biotech Ltd. [2012(276)ELT412(G.0.1)] it was held that the excess amount paid on differential value which is not forming part of transaction value being in excess of the value determined under Section 4 of the act, cannot be treated as duty but rather a deposit which was permitted by way of re-credit;

3.6 that for the instant exports, per the provisions of Rule 19 of the Central Excise Rules, 2002, the applicant was eligible for an option of effecting the clearances of the export goods without the payment of Central Excise duty from the first clearance itself, at the time of clearance from manufacturing premises, instead of following the rebate route they could have followed CT-1/B-1 Bond procedure, which was not exercised.

4. Aggrieved by the Orders-in-Appeal the applicant filed the instant revision application on the following grounds

4.1 that the rebate claim was filed in the capacity of a merchant exporter who is eligible to get rebate of the duty paid at the time of export by the manufacturer and thus the rebate claims were filed as per the law;

4.2 That the jurisdictional officer while allowing the rebate verified all the components and found it correct which established that the manufacturers had paid excise duty on excisable goods exported on the value which is inclusive of cost and freight which is contrary to the provisions of Section 4 of the Central Excise Act, 1944 read with the Central Excise Valuation Rules;

4.3 that the difference between the FOB and transaction value was due to purchase of the materials as per market rate and market fluctuation. The applicant states that the purchase order mentions the rate as per the LME (London Metal Exchange) and the FOB value was taken on customs exchange rate which changes each month has an effect on the FOB value. Also they being merchant exporters had to purchase partly from different manufacturers and at different rates;

4.4 that the rebate claim was applied on the basis of transaction value as per Section 4 of the Central Excise Act, 1944 and for the export; the port is the place of removal. Therefore, all the expenses up to the port had been included in transaction value and which is as per ARE-1. Reliance was placed on the case of CCE Vs Maini Precision Products [2010 (252) ELT 409], where the Hon'ble Tribunal held that rebate was payable even if duty is paid on CIF value. Reliance was also placed on the judgment of the GOI in the case of Balkrishna Ind. Ltd. [2011 (271) ELT 148];

4.5 that as held in the case of Orchid Health Care, the Hon'ble Madras High Court had considered a case of an Export Oriented Undertaking that allowing rebate by way of credit was held to be meaningless and hence illegal and the same principle was applicable in the present case also as a merchant exporter was not required to pay any excise duty and hence credit of duties paid on the goods purchased cannot be utilized by the them in any manner whatsoever;

4.6 that the judgement in case of Nahar Industrial Enterprises Ltd. relied upon by the Commissioner(Appeals) for deciding against the Applicant is inapplicable in law as well as in facts of this case as M/s. Nahar Industrial Enterprises Ltd. were paying excise duty on a lower price for the goods sold in the local market whereas higher price was declared for same goods when exported for encashing accumulated cenvat credit while discharging duty liability on the exported goods so that refund of a higher amount could be obtained by them. That in the present case, there was no evidence to show that the manufacturers who had sold the goods to the applicant had sold similar goods, namely waste and scrap of various metals to local buyers at a lower price and that these manufacturers had encashed accumulated Cenvat credit for paying excise duty on the goods sold to the Applicant. Also, M/s. Nahar Industrial Enterprises Ltd. was a manufacturer and therefore allowing rebate by way of credit served their purpose since such credit could be utilized for paying excise duties on other goods cleared in domestic market. The applicant is a merchant exporter, not having any excise liability and therefore the applicant could never utilize such credit for paying excise duty on any other goods;

4.7 That the decision rendered by the Hon'ble Punjab & Haryana High Court in case of Nahar Industrial Enterprises Ltd. was not applicable at all in the facts of the present case. Reliance has been placed on the case of Suncity Alloys Pvt. Ltd. [2007 (218) ELT 174 (Raj.)].

4.8 That on the above, Orders-In-Appeal be set aside.

5. Personal hearing was scheduled in this case on 10.08.2021, 17.08.2021, 15.12.2021 and 21.12.2021. However, no one appeared before the Revision Authority for personal hearing on any of the dates fixed for hearing. Since sufficient opportunity for personal hearing has been given in the matter, the case is taken up for decision on the basis of the available records.

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

6.1. On perusal of records, the applicant, merchant exporter had procured the goods from various manufacturers and exported the goods under claim of rebate in terms of Rule 18 of Central Excise Rules. The assessable value of the said exported goods was higher than the FOB value of the goods. The cases at Sr. No 1 and 2 of the table at Para No. 2 are in respect of Orders-in Original issued pursuant to issue of protective demands issued to the applicant for recovery of amount of difference between the assessable value and FOB, paid in cash to the applicant and the cases at Sr. No 3 and 4 are refund orders issued in respect of the claims filed by the applicant. The appeals filed by the applicant were rejected by the Appellate Authority vide Orders-in-Appeal Nos. BVR-EXCUS-000-APP-44 TO 47-14-15 (No. 44 to 47/2014-15 (BVR)/SKS/Commr(A)/Ahd) dated 17.11.2014 and at Para 8.1 and 8.2 it was held that:

> *"8.1.... for the first batch of two appeals, I hold that though the sanctioning authority had erred initially in sanctioning of rebate claims entirely in cash to the appellants, even when the F.O.B./Shipping bill values of the exported goods were lesser than the assessable values as mentioned in the respective ARE-1s, the curative action of order of recovery of erroneous refunds by way of issuance of SCNS followed by the impugned order No.1 & 2 were the proper actions of the adjudicating authority and thus both the impugned orders are legally correct. I therefore reject both the appeals and uphold the corresponding impugned orders No.1 & No.2. The appellant is required to deposit the 'erroneous refund' amounts sanctioned to by them in cash into the Government account alongwith the interest amounts due, as confirmed.*
>
> *8.2 As for the appeals listed as third and fourth appeals, arising from the orders of rebate, I uphold that the two impugned orders are legally correct and proper and in consonance with the decisions of the Revisionary authority as well as the other pronouncements, as discussed in the foregoing Appeal*

paras, the adjudicating authority has properly ordered for allowing the rebates of "extra deposited duty" by way of sanctioning full rebates and ordering for equivalent Cenvat Credits to the respective manufacturers, hence those two appeals do not survive as well."

7. For a better understanding of the issue the relevant statutory provisions for determination of value of excisable goods are extracted below:

(i) As per Section 4(1) of Central Excise Act, 1944

"(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall-

(a) in a case where the goods are sold by the assessee, for delivery at the 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;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."

(ii) Word 'Sale' has been defined in Section 2(h) of the Central Excise Act, 1944, which reads as follows:

"(h) 'Sale' and 'Purchase' with their grammatical variations and cognate expression, mean any transfer of the possession of goods by one person on another in ordinary course of trade or business for cash or deferred payment or other valuable consideration."

(iii) Place of Removal has been defined under Section 4(3)(c)(i), (ii),(iii) 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."

(iv) The Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 is also relevant which is reproduced below:

"Rule 5. 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 up to 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 o 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 o determining the value of the excisable goods."

8. From the perusal of above provisions Government finds that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. Further, the exporter is not liable to pay Central Excise duty on the CIF value of the goods but the Central Excise duty is to be paid on the transaction value of the goods as prescribed und Section 4 of the Central Excise Act, 1944.

9. Government is in agreement with the findings of the Commissioner(Appeals) that the adjudicating authority has erred in sanctioning rebate claim entirely in cash, when the FOB value of the exported goods was lower than the assessable in the respective ARE-1's.

10. Government observes that the Applicant in their revision application has submitted that

> *"The Applicant is a merchant exporter and therefore the Applicant is not maintaining any Cenvat Register. The Applicant is not obliged to pay any excise duty on air/ goods and therefore there is no question of maintaining any Cenvat Register and availing Cenvat credit of duties paid on any goods purchased by the Applicant. Rebate of Central Excise duty paid on the exported goods by way of re-credit in favour of a merchant exporter is meaningless because a merchant exporter could not take any benefit of such re-credit."*

11. Government observes that in the case of GOI's Order No. 97/ 2014-Cx dated 26.03.2014 In re: Sumitomo Chemicals India Pvt. Ltd. (2014(308) E.L.T. 198(G.O.I.)] Government discussed the provisions of Section 4(1)(a) of Central Excise Act, 1944, Rule 5 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 as well as the definitions of 'Sale' and 'Place of Removal' as per Section 2(h) and Section 4(3)(c)(i), (ii), (iii) of Central Excise Act, 1944 respectively, and observed as under:

> *"it is clear that the place of removal may be factory/warehouse, a depot, premise of a consignment agent or any other place of removal from where the excisable goods are to be sold for delivery at place of removal. The meaning of word "any other place" read with definition of "Sale", cannot be construed to have meaning of any place outside geographical limits of India. The reason of such conclusion is that as per Section 4 of Central Excise Act, 1944, the Act is applicable within the territorial jurisdiction of whole of India and the said transaction value deals with value of excisable goods produced/manufactured within this country. Government observes that once the place of removal is decided within the geographical limit of the country, it*

cannot be beyond the port of loading of the export goods. It can either be factory, warehouse or port/Customs Land Station of export and expenses of freight/insurance etc. incurred upto place of removal form part of assessable value. Under such circumstances, the place of removal is the port/place of export since sale takes place at the port /place of export.

At para 9 of the said order GOI held that

9. Government notes that in this case the duty was paid on CIF value as admitted by applicant. The ocean freight and insurance incurred beyond the port, being place of removal in the case cannot be part of transaction value in terms of statutory provisions discussed above. Therefore, rebate of excess duty paid on said portion of value which was in excess of transaction value was rightly denied. Applicant has contended that if rebate is not allowed then the said amount may be allowed to be re-credited in the Cenvat credit account. Applicant is merchant-exporter and then re-credit of excess paid duty may be allowed in Cenvat credit account from where it was paid subject to compliance of provisions of Section 12B of Central Excise Act, 1944".

12. Government observes that the respective manufacturers who supplied the goods to the applicant are availing the benefit of Cenvat Credit scheme. Government places its reliance on the Hon'ble Gujarat High Court order dated 09.01.2016. In RE: Garden Silk Mills Ltd Vs UOI [2018 (2) TMI 15 Gujarat High Court] where in it was held that

"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, the same was perfectly legitimate. The Government of India should not have asked the

petitioner to file separate application for such purpose. The Government of India itself in case of Balkrishna Industries Ltd. (supra), had substantially similar circumstance provided as under:

> *"8. In this regards, Government observed 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 the transaction value of the goods determined under Section4 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 charge. 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 recredit the excess amount paid by the petitioner categorizing as excise duty of CIF value of the goods to the Cenvat credit account.

11. Petition is disposed of."

13. Government finds that as the facts of the present Revision Application are similar to the above quoted cases, the ratio of the same is squarely applicable to this case. Government also relies on an identical case of the same applicant where the departmental appeal had been ruled in the favour of the Department vide GOI Order No. 1305-1313/13-Cx dated 10.10.2013

14. In view of above discussions, Government does not find any infirmity in the Orders-in-Appeal Nos. BVR-EXCUS-000-APP-44 TO 47-14-15 (No. 44

to 47/2014-15 (BVR)/SKS/Commr(A)/Ahd) dated 17.11.2014 passed by the of Central Excise (Appeals) Ahmedabad, (Rajkot (Appeals) Unit) and upholds the same.

15. The Revision application is rejected as being devoid of merits.

Shrawan 23/9/22

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

916-919

ORDER No. /2022-CX (WZ) /ASRA/Mumbai dated 23.09.2022

To,
M/s. Laxmisagar Tradelink Pvt Ltd,
234, Madhav Darshan, Waghwadi Road,
Dist-Bhavnagar, Gujarat 364 001

Copy to:

1. The Commissioner of CGST, Bhavnagar, Siddhi Sadan Building, Plot No 67-76 B-1, Narayan Bhai Upadhya Marg, Kalubha Road, Bhavnagar, Gujarat 364 001.
2. The Commissioner of CGST, Rajkot Appeals, 2nd Floor, GST Bhavan, Race Course, Ring Road, Rajkot 360 001.
3. Sr. P.S. to AS (RA), Mumbai
4. Notice Board.
5. Spare Copy