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F.No. 195/18-19/12-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 31/8/14

Order No. 94-95/14-cx dated 25-03-2014 of the Government of India, passed by Shri D. P. Singh, Joint Secretary to the Government of India, under section 35 EE of the Central Excise Act, 1944.

Subject	:	Revision Application filed, under section 35 EE of the Central Excise, 1944 against the Order-in-Appeal No. 341 & 342/RGD/2011 dated 14-10-2011 passed by Commissioner of Central Excise, (Appeals), Raigad.
Applicant	:	M/s. Tata Motors Ltd., One Indiabulls Centre, Towrer 2A 14th floor, 841, S.B. Marg, Elphinstone Road, Mumbai-400013.
Respondent	:	Commissioner of Central Excise, Raigad.

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ORDER

These revision applications are filed by the applicant M/s. Tata Motors Ltd., One Indiabulls Centre, Towrer 2A 14th floor, 841, S.B. Marg, Elphinstone Road, Mumbai against the Orders-in-Appeal No. 341 & 342/RGD/2011 dated 14-10-2011 passed by the Commissioner of Customs (Appeals), Raigad with respect to Order-in Original No. RGD/ADC/02/10-11, dated 31-08-2010 passed by the Additional Commissioner of Central Excise, Raigad.

2. Brief facts of the case are that M/s. Tata Motors have filed a brand rate application on 28-05-2009 for duty drawback under Rule 7 (1) of the Drawback Rules, 1995 for the Ambulances falling under CTH 87033392 exported vide shipping bill No. 5494339 Bill No. 5494339 dt. 23-03-2009. The amount of drawback claimed is Rs. 13,66,618/- for 10 Ambulances. All Industry Rate drawback @ 1% of FOB is notified for the ambulances which is very low as compared to Duty drawback rates claimed by the applicant.

2.1 The applicant's working for fixing of Brand Rate per 01 Ambulance is as follows:

i) For the Chassis built by M/s. Tata Motors Jamshedpur. As per the All Industry Brand Rate @ 1% FOB towards customs duty on item that have gone in the indigenously manufactured chassis and not offset of cenvat = 3359.13

ii) For the Body built at M/s. Anthony Garage, Patalganga, as per the All Industry Brand Rate @ 1% FOB towards customs duty on item that have gone in the indigenously manufactured chassis and not offset of cenvat = 4400/-

iii) Drawback of duties of customs paid on the accessories i.e. Air conditioner MBF-140 RIN, Generator, Heater Blower and Heater Kit fitted on the ambulances = 128902.73

Total + 136661.86

2.2 The chassis were manufactured at the applicant's factory at Jamshedpur and cleared to M/s Anthony Garage Pvt. Ltd, Patalganga, for body building without

payment of duty under bond. The applicant has availed the cenvat credit of the input used in the manufacture of chassis. As far as M/s Anthony Garage Pvt. Ltd, Patalganga is concerned, the chassis is received by them without payment of duty under bond, but they also might have taken cenvat credit of the other inputs used. However, All India Brand Rates for both the chassis and body falling under 8706 & 8707, respectively are @ 1% of FOB & 1.1% of FOB irrespective of the fact that whether cenvat is availed or otherwise. As far as accessories i.e. Air conditioner MBF,-Generator, heater Blower and Heater Kit are concerned, the same are imported by the applicant and they have stated that neither they themselves nor their body builder has availed cenvat credit facility for the same.

2.3 On scrutiny of the application and the Divisional verification report on the drawback claim of the assessee it was found that the verification report was not submitted by the Divisional office in terms of the Board's circular No. 14/2003-Cus dt. 06-03-2003 and the exporter had not submitted the certificate regarding non-availment of Cenvat credit of CVD and SAD paid on the accessories imported of which the duties paid are sought to be included while fixing the Brand rate of duty drawback.

2.4 Initial verification of the drawback claim was done by the AC Rasayani Dn. However, since it was not as stipulated in the Board's Circular No. 14/2003-Cus dt. 06-03-2003 the Divisional A.C. was again requested to furnish the requisite report. In response the Assistant Commissioner has informed that in spite of several reminders by Division as well as Range Officer the exporter has not responded and they failed to produce relevant documents for verification of cenvat credit availment/non availment from the manufacturer. Hence, Divisional officer could not submit the requisite report.

2.5 Notice to show cause notice dtd. 01-07-2010 was issued to the applicant for rejection of the claim on the following grounds:-

i) The applicant has not proved beyond doubt that cenvat credit is not availed by them on the accessories viz. Air conditioner, Generator, Heater Blower and heater kit fitted on the Ambulances.

ii) The dates of ARE-1 shown in the shipping bill are not matching with that of the ARE-1s raised at the time of removal of goods for export from the premises of the body builder and therefore it cannot be corroborated that the goods which are exported are the same which are got manufactured at M/s. Anthony Garage, Patalganaga and,

iii) Value addition n respect of the accessories Air conditioner, Generator, Heater Blower and heater kit fitted on the ambulances is negative i.e. as against import value of $ 7471.09 the FOB value of export is $ 7102.96. In this case although the FOB value of each ambulance is more than the CIF value of the accessories imported, since the exporter has claimed brand rate of DBK for chassis and body at All Industry Rates, the FOB value of the accessories, for which brand rate claimed is worked out on the bsis of actual duty payment, should not be less than its CIF value of the same at the time of import. Thus it appears that the case is hit by the restrictive clause of Rule 8 (2) and therefore the Brand rate cannot be fixed.

2.6 After following due process of law, adjudicating authority passed the following orders:-

" In view of the above discussions the brand rate available to the applicant works out as under:-

	Value declared in the ARE-1 reduced by 35%	All India Brand Rate	Amount
Chassis	Rs. 513012/-	1% of FOB	Rs. 5130/-
Body	Rs. 260000/-	1.1% of FOB	Rs. 2860/-
Accessories	Nil as FOB value of export is less than CIF value at the time of import		NIL
			Total Rs. 7990/-

As All India rate for ambulance is 1% of FOB value, the drawback payable for each ambulance works out to Rs. 10868/- (1% of FOB value i.e Rs. 10,86,800/-) on the basis of All India Rate and since the same is more than the brand rate payable on the basis of actual duty payment as explained above, the applicant's request for fixing brand rate cannot be acceded to as per rule 7 (2) of Central Excise and Customs drawback Rules.

In view of above discussions, the applicant's request for fixing brand rate is rejected. "

3. Being aggrieved by the said Order-in-Original, applicant filed appeal before Commissioner (Appeals), who rejected the same.

4. Being aggrieved by the impugned Orders-in-Appeal, the applicant has filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 Firstly, it is submitted that the Order-in-Original dtd. 31-08-2010 denied the claim of the duty drawback on the following grounds namely:

a) The date mentioned on the ARE-1 do not tally with the date mentioned thereof on the shipping bills;

b) No evidence to the effect that the cenvat credit on the imported accessories have not been availed, has been produced;

c) In terms of Rule 8 (2) of DBK Rules, 1995, the value of export of teh accessories used in the manufacture of exported ambulances are less than the CIF value of the imported accessories i.e. value addition in respect of the imported accessories are negative.

4.2 Further the Order-in-Appeal dtd. 14-10-2011 denies the drawback only on the grounds that the applicants have not achieved value addition as mentioned in clause (c) of above para A.1.

4.3 In other words, according to the Commissioner (Appeals) the applicants have complied with the conditions in respect of the clause (a) and (b) of para A.1. The only grounds given by the Commissioner (Appeals) for denying the benefit of drawback is this that the FOB value of export of accessories is less than the CIF value of the imported accessories. In this regard, the following observations of the Tribunal in Shriram Refrigeration Industries Ltd. Vs. Collector- 1986 (26) ELT 353 (Tribunal) may be referred to:

" 19. In his impugned order, the collector neither adverted to the aforesaid two grounds mentioned in the show cause notice nor to the applicants' reply thereto. The only reasonable conclusions from this would be that the collector was convinced by the applicants' reply and he dropped these two grounds while adjudicating upon the matter. The learned Joint Chief departmental Representative wants us to take these two grounds into account without telling us as to what is wrong with the applicants' explanation in regard to these two grounds. Obviously we are unable to accede to his request. "

4.4 According to the applicants Rule 8 (2) of the DBK Rules 1995 is not invokable

It is submitted that the Rule 8 (2) of the Drawback Rules, 1995 is not applicable in the present case. For ready reference, Rule 8 (2) of the Drawback Rules 1995 is reproduced below:-

8(2) " No amount or rate of drawback shall be determined in respect of any goods or class of goods under rule 6 or rule 7 as the case may be, if the export value of each of such goods or class of goods in the bill of export or shipping bill is less the value of imported materials used in the manufacture of such goods or class of goods, or is not more than such percentage of the value of imported materials used in the manufacture of such goods or class of goods as the central Government may, by notification in the official Gazette, specify in this behalf. "

4.5 First portion of the rule extracted above and relied upon in the present case applies to a case where there is no value addition achieved in India, when the export goods is manufactured out of imported raw materials. Therefore, this rule applies only when the export product is made out of imported raw materials alone.

4.6 In the present case, the ambulances have been made out of both imported as well the indigenous goods. The chassis and ambulance body has been manufactured in India and the Air conditioner and other parts/accessories fitted into the

ambulances have been imported. Therefore, the Rule 8 (2) of the Drawback Rules, 1995 itself is not applicable.

4.7 As the all industry rate of drawback are insufficient and does not fully reimburse the duties paid on the imported goods used in the exported ambulances, the applicants had applied for brand rate on fully built ambulances. Further, when the brand rate of drawback has been allowed on body and chasses the actual duty suffered on these imported accessories or components have not been taken into account.

4.8 The above proposition is based on the Board Circular No. 83/2003-Cus dtd. 18-09-2003, where the drawback available on complete bicycle is explained by way of an example. Relevant portion of the circular is reproduced below:-

*" **Illustration**:*

For example, an exporter exports a complete bicycle with certain accessories, i.e. indigenous seat cover, imported headlight, indigenous from basket, bicycle bell, bicycle stand carrier and freewheel multi-speed.

Brand rate of drawback in this case should be calculated by including following components:

All Industry Rates of duty drawback appearing at SS No. 87.44.

All Industry Rates of duty drawback for various accessories appearing in the duty drawback table in respect of which the exporter proves the usage of these accessories but does not furnish any duty paying documents i.e. bicycle bell, bicycle stand, carrier and freewheel multi speed.

Central Excise duty paid invoices as regards indigenous seat cover and indigenous front basket.

Duty paid bill of entry in case of imported headlight. "

4.9 In the above example, the exporter exports the complete bicycle which consists of certain accessories either procured indigenously or imported. While determining the brand rate of duty drawback. AIR on the value of the bicycle, AIR on imported accessories, excise duty on indigenous procurement and customs duty on imported components should be taken into account. In these types of case if all industry rate is notified for the products the assesses can get the same based on the FOB value and in respect of other accessories actual duties paid will be given. In other words, in these types of cases where the goods exported consists of imported as well indigenously goods, rule 8 (2) will not be applicable.

4.10 In the present case also, the applicants have exported compete ambulances consisting of body, chassis and imported accessories. The applicants have also computed the drawback on the imported accessories in the same manner as explained in the example given in the above circular dated 18-09-2003. Therefore in the present case also Rule 8 (2) of DBK Rules, 1995 will not applicable.

4.11 The CBEC vide circular No. 14/3-Cus dtd. 06-03-2003 has explained as to how the value addition is to be computed in the drawback cases. The value addition as defined in the said circular is as under:-

" (iv) Value Addition: Fixation of Brand Rate of drawback is, inter alia, subject to the satisfaction of Rule 8(2) of the Drawback Rules which stipulates that the f.o.b. value of the export goods should be more than the c.i.f. value of the imported inputs which are declared to have been utilised for manufacture of the export goods. A specimen of the calculation Sheet regarding the Value Addition is attached. In case of the corresponding Brand Rate letters which are issued for a period of time, the minimum f.o.b. value of the export item satisfying the condition may also be specified.

VALUE ADDITION WORKING SHEET
(for the purpose of Rule 8 (2) of the Drawback Rules)
(With reference to the fixation of Brand Rate of drawback for export of one Agricultural Tractor)
Value Addition: f.o.b. value- c.i.f. value x 100
c.i.f. value "

4.12 Therefore, the CBEC itself clarified that while computing the value addition, one has to take the FOB value of the exported product and the CIF value of the imported inputs. The export product in the present case is ambulance. The FOB value of the one ambulance exported out of India is Rs. 10,86,800/-. The CIF value of the accessories imported by the applicants for one ambulance is Rs. 3,47,412/- As the FOB value of one ambulance is more than the CIF value of the imported accessories used for one ambulance, this clearly reveals that Rule 8 (2) has been complies with.

4.13 The FOB value of the accessories shown in the Order-in-Original is nothing but assessable value of the imported accessories. The invoice as well as the shipping bill for completely built ambulances does not give break up of FOB value of the imported accessories. The value as shown therein does not represent the FOB

value of the accessories since there is no FOB value of export of these accessories available.

4.14 The figures shown in the Order-in-Original as FOB value of the accessories are nothing but assessable value/landed cost of the accessories shown in the statement filed by the applicants along with the drawback claim, by which the applicants have derived the FOB value of the chassis for the purpose of claiming All Industry Drawback for chassis.

4.15 The figures shown in the Order-in-Original as FOB value of accessories are nothing but assessable value/landed cost of the accessories shown in the statement filed by the applicants along with the drawback claim, by which the applicants have derived the FOB value of the chasses for the purpose of claiming All Industry Drawback for chassis.

4.16 As notes in the Order-in-Original the FOB value of the ambulance is more than the CIF value of the accessories as it comprises of the entire ambulance.

4.17 The method adopted by the applicants is in accordance with the circular dated 06-03-2003, 18-09-2003, 14-11-2003 issued by the board.

4.18 The Additional Commissioner in para 16 of the Order-in-Original has held that value given in the ARE-1 are the FOB value of the imported accessories and accordingly the Additional Commissioner has reduced the value of the imported accessories as given in he ARE-1s proportionate to the reduction in the FOB value of the exported ambulances to the extent of 65%. The same was upheld by the Commissioner (Appeals) in the impugned order.

4.19 The applicants submit that the finding of the lower authorities is incorrect. The applicants have exported the complete ambulances only and the FOB value of the accessories was never known to the applicants. The value given in the ARE-1 is also not the FOB value but the same may be the transaction value for the purpose of the determining the excise duty, if the applicants do not export the ambulances but clear in the domestic market.

4.20 It is settled law that a substantial benefit cannot be denied for the violation of the procedure.

4.21 Reliance is placed on the following observations of the Supreme Court in the case of Mangalore Chemicals & Fertilisers Ltd. Vs. Dy. Commissioner -1991 (55) ELT 437 (SC):

"11 ..... There are conditions and conditions. Some may be substantive, mandatory and based on considerations of policy and some others may merely belong to the area of procedure. It will be erroneous to attach equal importance to the non-observance of all conditions irrespective of the purpose they were intended to serve."

5. Hearing in this case was scheduled on 27-09-2013 and 11-03-2014. Hearing held on 11-03-2014 was attended by Shri S.Vasundevan, advocate, Shri Rachit Jain, advocate and Shri Madan Iyanger, C.A, who reiterated grounds of revision application. Nobody attended hearing on behalf of department.

6. Government has carefully gone through the relevant case records and perused the impugned Order-in-Original and Order-in-Appeal.

7. Government observes that the applicants exported the ambulance and filed application of fixing up of brand rate of drawback. The chassis was manufactured by the applicant in their Jamshedpur factory availing cenvat credit of inputs which was subsequently, sent to M/s. Anthony Garage, Patalganga for body building without payment of duty under Bond. The remaining accessories were imported by them on payment of applicable customs duties. The original authority vide impugned Order-in-Original denied the fixation of DBK brand rate on following grounds:-

a) The date mentioned on the ARE-1 do not tally with the date mentioned thereof on the shipping bills;

b) No evidence to the effect that the cenvat credit on the imported accessories have not been availed, has been produced;

c) In terms of Rule 8 (2) of DBK Rules, 1995, the value of export of the accessories used in the manufacture of exported ambulances are less than the CIF

value of the imported accessories i.e. value addition in respect of the imported accessories are negative.

Commissioner (Appeals) upheld impugned Order-in-Original. Now, the applicant has filed this revision application on grounds mentioned in para (4) above.

8. Government observes that the lower authorities mainly relying upon provisions of rule 8 (2) of the Drawback Rules, 1995 which reads as under:-

8(2) " No amount or rate of drawback shall be determined in respect of any goods or class of goods under rule 6 or rule 7 as the case may be, if the export value of each of such goods or class of goods in the bill of export or shipping bill is less the value of imported materials used in the manufacture of such goods or class of goods, or is not more than such percentage of the value of imported materials used in the manufacture of such goods or class of goods as the central Government may, by notification in the official Gazette, specify in this behalf. "

The original authority held that FOB value of export goods is less than the CIF value of the imported goods and hence, the drawback is not admissible in terms of above said provision 8 (2) of the Drawback Rules, 1995.

8.1 In this regard, the applicants has contended that the said provisions 8 (2) of the Drawback Rules, 1995 is not applicable to this case for the reason that the provision contained in rule 8 (2) is applicable only when the export product is made out of imported raw materials alone. In this case, they used imported as well indigenous materials and therefore, the rule 8 (2) of the Drawback Rules, 1995 is not applicable.

8.2 The applicant has placed reliance on the Board's Circular No. 83/2003-Cus dtd. 18-09-2003, wherein the drawback available on complete bycycle is explained by way of an example, relevant portion of the said circular is reproduces as under:-

" ***Illustration:***

For example, an exporter exports a complete bicycle with certain accessories, i.e. indigenous seat cover, imported headlight, indigenous from basket, bicycle bell, bicycle stand carrier and freewheel multi-speed.

Brand rate of drawback in this case should be calculated by including following components: All Industry Rates of duty drawback appearing at SS No. 87.44.

All Industry Rates of duty drawback for various accessories appearing in the duty drawback table in respect of which the exporter proves the usage of these accessories but does not furnish any duty paying documents i.e. bicycle bell, bicycle stand, carrier and freewheel multi speed.
Central Excise duty paid invoices as regards indigenous seat cover and indigenous front basket.
Duty paid bill of entry in case of imported headlight."

The applicant by above said circular has contended that when exported goods consist of both indigenous as well as imported goods, rule 8 (2) will not be applicable. The applicant has further relied upon Board's circular No. 14/03- Cus dtd. 06-03-2013 to explain as how the value addition is to be computed in drawback cases.

8.3 On perusal of impugned orders, Government finds that the lower authorities have not considered the above said circular No. 83/2003-Cus dtd. 18-09-2003 and Circular No. 14/03-Cs dtd. 06-03-2013, while deciding the case. Government notes any rule/statute is required to be interpreted taking into account the clarification /circular issued by CBEC. Interpretation of rule without taking into consideration clarification issued in the context of the rule may not lead to legal and proper conclusion. Since, in this case the applicant's contention of applicability of above said circular No. 14/03-Cus dtd. and circular No. 83/2003-Cus dtd. 18-09-2003 has not been considered and discussed, the impugned orders can be terms to have suffered from legal infirmity and required to be set aside, on this count alone.

9. In view of above discussions, in the interest of justice, Government finds it proper to remand the case back for reconsideration taking into account above said circular. Accordingly, the impugned orders are set aside and the case is remanded back to original authority for denovo adjudication in terms of above. A reasonable opportunity of hearing is to be afforded to concerned parties, before deciding the matter.

10. Revision Application is disposed off in above terms.

11. So, Ordered.

(D.P. Singh)
Joint Secretary to the Govt. of India

M/s. Tata Motors Ltd.,
One Indiabulls Centre,
Towrer 2A 14th floor,
841, S.B. Marg, Elphinstone Road,
Mumbai-400013.

ATTESTED

(भागवत शर्मा/Bhagwat Sharma)
सहायक आयुक्त/Assistant Commissioner
CBEC-OSD (Revision Application)
वित्त मंत्रालय (राजस्व विभाग)
Ministry of Finance (Deptt of Rev.)
भारत सरकार/Govt of India
नई दिल्ली/New Delhi

Order No.94-95/14-Cx dated 25-3-2014

Copy to:

1. The Commissioner, Central Excise, Raigad, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot NO. 1, Khandeshwar, Navi Mumbai-410 206.

2. The Commissioner (Appeals), Central Excise, Raigad, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot NO. 1, Khandeshwar, Navi Mumbai-410 206.

3. The Additional Commissioner, Central Excise, Raigad, Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot NO. 1, Khandeshwar, Navi Mumbai-410 206.

4. Guard File.

5. PS to JS (RA)

6. Spare Copy

ATTESTED

(BHAGWAT P. SHARMA)
OSD (REVISION APPLICATION)