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F.No.195/126/2012-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 31/3/14

ORDER NO. 97/14-Cx DATED 26.03.2014 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 Act, 1944 against the orders-in-appeal No.US/428/RGD/11 dated 24.11.2011 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II
APPLICANT	:	M/s Sumitomo Chemicals India Pvt. Ltd., Moti Mahal, 7th Floor, 195, J. Tata Road, Churchgate, Mumbai – 400 020
RESPONDENT	:	Comissioner of Central Excise, Raigad

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ORDER

This revision application is filed by M/s Sumitomo Chemicals India Pvt. Ltd., Moti Mahal, 7th Floor, 195, J. Tata Road, Churchgate, Mumbai – 400 020 against the order-in-appeal No.US/428/RGD/11 dated 24.11.2011 passed by Commissioner of Central Excise (Appeals) Mumbai Zone-II with respect to order-in-original No.2129/10-11/AC(Rebate) dated 18.03.2011 passed by Deputy Commissioner of Central Excise(Rebate), Raigad. The applicant is a merchant exporter.

2. Brief facts of the case are that in the instant case part rebate claim of Rs.2,03,514/- was rejected by Deputy Commissioner of Central Excise(Rebate), Raigad vide order-in-original No.2129/10-11/AC dated 18.03.2011 on the ground that the duty payable on the transaction value i.e. FOB value is rebatable under rule 18 of Central Excise Rules, 2002 and rebate of excess duty of Rs.2,03,514/- paid by assesse cannot be allowed.

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 order-in-appeal, the applicant has field this revision application under Section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds :

4.1 It is submitted that duty has been paid by applicant on the assessable value indicated in the ARE-1, 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.

4.2 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 stats the Maritime Commissioner should sanction the complete rebate even though the duty has been paid in excess.

4.3 It is submitted that Rule 18 of Central Excise Rules 2002 speaks of "rebate of duty paid on the excisable goods" and "duty paid on materials used in manufacture of goods" and not of duty payable. Further Notification No.19/2004-CE(NT) dated 06.09.2004 issued under rule 18 of the Central Excise Rules 2002 for granting rebate of duty for exports also speaks about duty paid and not on duty payable.

4.4 It is said excess amount is denied as rebate, then that means same was not liable to include in the assessable value and therefore duty was not liable to be paid on the same. IN the case of Sri Bhagirath Textiles Ltd. 2006 (202) ELT 147 (GOI) 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.

5. Personal hearing scheduled in this case on 26.11.2013 & 11.03.2014 was not attended by anybody on behalf of the applicant as well as respondent party.

6. Government has carefully gone through the relevant case records and perused the impugned order-in-original and order-in-appeal.

7. On perusal of records, Government notes that applicant a merchant exporter filed rebate claims of Rs.51,61,636/- in respect of duty paid on exported goods. Since the duty was paid on ARE-1 value which was CIF value, the original authority determined the FOB value as transaction value in terms of section 4 of Central Excise Act, 1944 and allowed the rebate of Rs.49,58,022/- of duty payable on the said transaction value. The part claim of Rs.2,03,514/- in respect of excess duty paid on value portion in excess of transaction value was rejected. Commissioner (Appeals) upheld the said order-in-original. Now applicant has filed this revision application on the grounds stated above.

8. Government observes that for proper understanding and consideration issue involved the relevant statutory provisions for determination of value of excisable goods are required to be perused and the same are extracted below:-

8.1 As per basic applicable section 4(1) (a) of 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.

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

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

" 'Sale' and 'Purchase' with their grammatical variations and cognnate 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."

8.3 Place of Removal has been defined under Section 4(3) ©(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.

8.4 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 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 from the perusal of above provisions 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 1 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 can not be beyond the port of loading of the export goods. Under such circumstances, the place of removal is the port of export where sale takes place. The GOI order No.271/05 dated 25.7.05 in the case of CCE Nagpur Vs. M/s Bhagirath Textiles Ltd. reported as 2006 (202) ELT 147 (GOI) has also held as under:-

"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

under Section 4 of the Central Excise Act, 1944". It is clear from the order that in any case duty is not to be paid on the CIF value.

8.5 Supreme Court in its order in Civil appeal No. 7230/1999 and CA No.1163 of 2000 in the case of M/s Escort JCB Ltd. Vs CCE Delhi reported on 2002 (146) ELT 31 (SC) observed (in para 13 of the said judgement) that

> *"in view of the discussions held above in our view the Commissioner of Central Excise and CEGAT erred in drawing an inference that the ownership in the property continued to be retained by the assessee till it was delivered to the buyer for the reason that the assessee had arranged for the transport and transit insurance. Such a conclusion is not sustainable".*

Further, CBEC vide it (Section) 37B order 59/1/2003-CX dated 03-03-2003 has clarified as under:-

> *"7. 'Assessable value' is to be determined at the "place of removal". Prior to 1-7-2000, "Place of removal" [section 4(4)(b), sub-clauses (i),(ii) and (iii)], was the factory gate, warehouse or the depot or any other premises from where the goods were to be sold. Though the definition of "place of removal" was amended with effect from 1-7-2000, the point of determination of the assessable value under section 4 remained substantially the same. Section 4(3) (c) (i) [as on 1-7-2000] was identical to the earlier provision contained in section 4(4)(b)(i), section 4 (3)(c)(ii) was identical to the earlier provision in section 4(4)(b)(ii) and rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, took care of the situation covered by the earlier section 4(4)(b)(iii). In the Finance Bill, 2003 (clause 128), the definition "place of removal" is proposed to be restored, through amendment of section 4 to the position as it existed just prior to 1-7-2000.*
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> *8. Thus, it would be essential in each case of removal of excisable goods to determine the point of "sale". As per the above two Apex Court decisions this will depend on the terms (or conditions of contract) of the sale. The 'insurance' of the goods during transit will, however, not be the sole consideration to decide the ownership or the point of sale of the goods."*

8.7 Government observes that the respondent in their counter reply relied upon the CBEC circular 203/37/96-Cx dated 26.4.96 and circular No.510/06/2000-Cx dated 3.2.2000.In this regard, the Government observes that w.e.f. 1.7.2000, the concept of transaction value was introduced for valuation of goods under Central Excise Act. Though the CBEC circular 203/37/96-Cx dated 26.4.96 was issued when transaction

value concept was not introduced yet the said circular clearly states that AR4 value of excisable goods should be determined under section 4 of Central Excise Act, 1944 which is required to be mentioned on the Central Excise invoices. Even now the ARE-1 value is to be the value of excisable goods determined under section 4 of Central Excise Act,1944 i.e. the transaction value as defined in section 4(3)(d) of Central Excise Act. CBEC has further reiterated in its subsequent circular No.510/06/2000-Cx dated 3.2.2000 that as clarified in circular dated 26.4.96 the AR4 value is to be determined under section 4 of Central Excise Act, 1944 and this value is relevant for the purpose of rule 12 and 13 of Central Excise Rules. The AR4 and rule 12/13 are now replaced by ARE-1 and rule 18/19 of Central Excise Rules, 2002. It has been stipulated in the notification No.19/04-CE(NT) dated 6.9.04 and the CBEC circular No.510/06/2000-Cx dated 3.2.2000 that rebate of whole of duty paid on all excisable goods will be granted. Here also the whole duty of excise would mean the duty payable under the provisions of Central Excise Act. Any amount paid in excess of duty liability on one's own volition cannot be treated as duty. But it has to be treated simply a voluntary deposit with the Government which is required to be returned to the respondent in the manner in which it was paid as the said amount cannot be retained by Government without any authority of law. Hon'ble High Court of Punjab & Haryana at Chandigarh vide order dated 11.9.2008 in CWP Nos.2235 & 3358 of 2007, in the case of M/s. Nahar Industrial Enterprises Ltd. Vs. UOI reported as 2009 (235) ELT-22 (P&H) has decided as under:-

"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."

Hon'ble High Court of Punjab & Haryana has observed that refund in cash of higher duty paid on export product which was not payable, is not admissible and refund of said excess paid duty/amount in Cenvat Credit is appropriate. As such the excess paid amount/duty is required to be returned to the respondent in the manner in which it was paid by him initially.

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 removed 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 recredited in the

cenvat credit account. Applicant is merchant exporter and then recredit 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.

10. The revision application is disposed off in terms of above.

11. So ordered.

(D.P. Singh)
Joint Secretary(Revision Application)

M/s Sumitomo Chemicals India Pvt. Ltd.,
Moti Mahal, 7th Floor, 195, J. Tata Road,
Churchgate, Mumbai – 400 020

(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. 97/14-Cx dated 26.03.2014

Copy to:

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

2. Commissioner of Central Excise (Appeals-II), Mumbai, 3rd Floor, Utpad Shulk Bhavan, Plot No. C-24, Sector-E, Bandra-Kurla Complex, Bandra (East), Mumbai-400051.

3. The Deputy Commissioner of Central Excise (Rebate), Ground Floor, Kendriya Utpad Shulk Bhawan, Sector-17, Plot No.1, Khandeshwar,Navi Mumbai -410 206.

4. PA to JS(RA)

5. Guard File.

6. Spare Copy

(B.P. Sharma)
OSD(Revision Application)