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**F.No. 195/282/11-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 26/3/13

Order No. 291/13-cx dated 26-03-2013 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. 25 (CB) CE/JPR-II/10 dated 27-01-2011 passed by Commissioner of Customs & Central Excise (Appeals), Jaipur-II.
- Applicant** : M/s. Hindustan Zinc Ltd., Rajasthan.
- Respondent** : Commissioner of Central Excise, Jaipur.

ORDER

This revision application is filed by M/s. Hindustan Zinc Ltd., Rajasthan against the Orders-in-Appeal No. 25 (CB) CE/JPR-II/10 dated 27-01-2011 passed by Commissioner of Customs & Central Excise (Appeals), Jaipur-II with respect to Order-in Original passed by Assistant Commissioner of Central Excise, Division, Udaipur.

2. Brief facts of the case are that the applicant filed rebate claim for Rs. 1,98,03,243/- for the goods exported during the period 11-02-2009 to 20-02-2009 in terms of Notification No. 19/2004-CE (NT) dt. 06-09-2004, issued under rule 18 of the Central Excise Rules, 2002 read with section 11 B of the Central Excise Act, 1944. A Show Cause Notice dt. 06-10-2009 was issued to the assessee for rejecting the rebate claims filed by them on the following grounds:

- i) As per invoices issued under rule 11 of the Central Excise Rules, 2002, the goods have been shown exported under LUT and not on payment of duty to claim the rebate.
- ii) Prior to the month of Feb. 09 the assessee had been exporting lead concentrate @ Rs. 22,000/- per DMT under LUT. Even on 11-02-2009 the assessee had exported 579.550 DMT lead concentrate @ Rs. 22,000/- per DMT under claim of rebate of duty vide ARE-I no. 54 dt. 11-02-2009 and invoice no. 11553 to 11578. But the same goods were cleared for export during 12-02-2009 to 20-02-2009 under ARE-I nos. 55 to 63 and invoice nos. 11579 to 11581 and 11583 to 11683 @ Rs. 74,000/- per DMT under claim of rebate of duty. Thus the assessable value of the said goods for export under claim of rebate of duty appeared abnormally high with the sole objective to en-cash the accumulated cenvat credit by way of overvaluation of export goods.

The Assistant Commissioner of Central Excise Division, Udaipur vide impugned Order-in-Original, sanctioned rebate of Rs. 77,27,060/- in cash and allowed re-credit of Rs. 1,20,76,183/- to the assessee by taking into consideration the assessable value as Rs. 24200/- per DMT.

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 filed this revision application under section 35 EE of Central Excise Act, 1944 before Central Government on the following grounds:

4.1 As per agreement between the parties the Treatment Charges and the Refining Charges were fixed. On the basis of this the final price at which the goods have been sold to the buyer by the petitioner has been determined and the buyer has paid the transaction value to the petitioner. The B.R.C for the payment has been submitted to the department. Therefore, there was no requirement for certification of the Treatment Charges and the Refining Charges by any Chartered or Cost Accountant. It is submitted that the said charges are dependent upon the quality of concentrate and the method employed for treatment or refining. These are fixed after detailed technical analysis of the sample of the concentrate by the foreign party and after cost analysis for the method to be applied for treatment/refining. On the basis of these parameters the quantum of charges is fixed and consideration for sale is paid by the buyer to the seller. Therefore, certification of such charges by a C.A or by a Cost Accountant was neither possible nor required. The same should have been accepted on the basis of the agreement alone.

4.2 Evidences submitted by the applicant have not been countered by way of substantial observations by the lower authorities. Documents such as invoice calculation for lead export, copy of LME date taken from interest etc. were not taken into account by the lower authorities in proper context.

4.3 The determination of value by the lower authorities in terms of rule 8 is not proper for the reason that value determined under rule (8) of Central Excise valuation rules, 2000 does not represent rule (4) transaction value, which is determined under said rules. As such, the observations of lower authorities is violation of para 4.11 of CBEC's manual of supplementary instructions.

5. The department vide their written submission C.No. IV (16) R/233/2010 dt. 11-10-2011, mainly stated as follows:-

5.1 The price charged or realized from the overseas buyers cannot form the basis for ascertaining "transaction value" of export goods in terms of section 4 of the Central Excise Act, 1944 as the act extends to India only. As per agreement made between the applicant and buyer, there was no contract price for sale of "lead Concentrate", the price was to be determined with reference to lead payable metals less "treatment charge and refining charges" as quoted in London Metals Exchange and published in the "London metals Bulletin". The transaction value of Rs. 74,000/- for the goods exported to the foreign buyer namely M/s. MRI Trading, Switzerland based on settlement prices US\$ per tone for Feb. 2009 for "payable metals" and not for lead concentrate. The price is to be determined on daily basis as per the condition of para 5.1 of the agreement.

5.2 The applicant had exported lead concentrate @ Rs. 22,000/- per DMT under LUT but from the month of Feb. 2009 are clearing the said goods @ 74,000/- per DMT for export under rebate. Thus the value/price of the said goods for export has been increased abnormally by the applicant. They are also clearing/transferring the said goods to their sister concern @ 24,200/- per DMT. Thus the applicant has increased the price by Rs. 52,000/- suddenly whereas the value of the exported goods should be equivalent/nearest to the value of same goods assessed for clearance for home consumption. Thus it is a clear case of over valuation.

5.3 No independent sale price/transaction value of the impugned goods is available in domestic market, the adjudicating authority adopted cost construction method under rule 8 of Central Excise valuation rules, 2000 which comes to Rs. 24,200/- for the goods transferred to the sister concern unit by the applicant.

5.4 In case of non availability of sale price for determining value under section 4 (1) (a) the only recourse available in such circumstances is the provision in terms of section 4 (1) (b) read with Central Excise valuation rules, 2000. As per para

4.1 of chapter 8 of CBEC's Excise Manual of supplementary instructions, the goods shall be assessed to duty in the same manner as the goods for home consumption and the value shall be the "transaction value" and should conform to section 4 or section 4-A as the case may be of Central Excise Act, 1944. Thus the assessable value of exported goods should be equivalent/nearest to the value of same goods to their sister concern @ 24,200/- per DMT, therefore in the instant case, the transaction value for export goods was taken by adopting the cost constructions method under section 4 (1) (b) read with rule 8 of Central Excise valuation Rules, 2000 and taken to be @ 24,200/- per DMT. The applicant have paid more duties for en-cashing the accumulated credit.

5.5 The contention of the applicant is baseless as the case law cited by the applicant is distinguishable on the ground that it pertains to rebate under rule 12 of the erstwhile Central Excise Rules, 1944 and relevant notification, whereas, the instant claim has been filed under rule 18 of Central Excise Rules, 2002 read with section 11B of the Central Excise Act, 1944. The adjudicating authority has correctly passed the order on the basis of facts and merits.

5.6 As per para 4.1 of chapter 8 of CBEC's Excise Manual of supplementary instructions, the goods (export) should be assessed to duty in the same manner as the goods for home consumption and the value should be the transaction value. In view of this the transaction between the seller and buyer cannot be treated as transaction value under section 4 of the Central Excise Act, 1944 as contested by the applicant. Further the applicants contention that para 5 of the agreement spells out the mechanism of determination of price is not tenable as there was no contract price for sale of lead concentrate in para 5 of the said agreement dt. 21-01-2009 signed between the applicant and M/s. MRI Trading AG, Switzerland. The price was to be determined with reference to "Payable metals less treatment charge and refining charges "as quoted in London Metals Exchange and published in the "London Metal Bulletins".

6. Personal hearing was scheduled in this case on 09-10-2011 & 06-12-2012 and 21-02-2013. Hearing scheduled on 06-12-2012 was attended by Shri Apurva Bhattacharya, advocate and Shri V.V.Nandawat, AGM (Finance) on behalf of the respondent who reiterated the grounds of Revision Application. Nobody attended hearing on behalf of respondent department on any of the above said dates.

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

8. Government observes that in this case the applicant filed rebate claim of total amount of Rs. 1,98,03,243/-. The original authority observed that the value of goods exported under claim of rebate was abnormally high as compared to same goods clear under LUT/Bond and also to their sister concern. Accordingly, the original re-determined the transaction value @ Rs. 24200 per DMT as against declared value of Rs. 74,000/- Per DMT and allowed the cash rebate upto such value and remaining amount was allowed to be re-credited in Cenvat account of the applicants vide impugned Order-in-original. Commissioner (Appeals) rejected the applicants appeal. Now, the applicants has filed this revision application on grounds mentioned in para (4) above.

9. Government observes that the lower authorities have observed that the applicants prior to February, 2009 clearing the similar goods under LUT @ Rs. 22,000 per DMT, however, clear the similar goods @ Rs. 74,000/- per DMT for goods cleared for export. Even on 11-02-2009, assessee had exported 579.55 DMT Lead concentrate @ Rs. 22,000/- per DMT under claim of rebate vide ARE-I No. 54 dt. 11-02-2009 & Central Excise Invoice Nos. 11553 to 11578. The same goods cleared for export during 12-02-2009 to 20-02-2009 under ARE-I No. 59 to 63 @ Rs. 74,000/- per DMT under claim of rebate. As such, there was abnormal increase in value of goods when exported under claim of rebate. It has been further observed that in respect of inter-unit transfer to their sister concern, the applicants have been discharging duty at value of Rs. 24,200/DMT as determined in terms of rule 8 of the

Central Excise valuation rules. Further, the range superintendent has also observed that the applicants were clearing goods @ 24200 per DMT.

9.1 Government notes that as per agreement made between the applicant and buyer, there was no contract price for sale of "lead Concentrate", the price was to be determined with reference to lead payable metals less "treatment charge and refining charges" as quoted in London Metals Exchange and published in the "London metals Bulletin". The transaction value of Rs. 74,000/- for the goods exported to the foreign buyer namely M/s. MRI Trading, Switzerland based on settlement prices US\$ per tone for Feb. 2009 for "payable metals" and not for lead concentrate. The price is to be determined on daily basis as per the condition of para 5.1 of the agreement. No independent sale price/transaction value of the impugned goods is available in domestic market, the adjudicating authority adopted cost construction method under rule 8 of Central Excise valuation rules, 2000 which comes to Rs. 24,200/- for the goods transferred to the sister concern unit by the applicant.

9.2 In view of above position, the assessable value of Rs. 24,200/- per DMT is rightly determined by the lower authority is in accordance with provision of section 4(1) (b) read with Rule 8 of Central Excise valuation Rules 2000 by adopting cost construction method.

10. 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:-

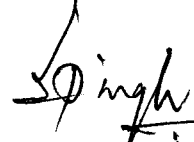
" Rebate/Refund – Mode of payment – Petitioner paid lesser duty on domestic product and higher duty on export product which was not payable – Assessee not entitled to refund thereof in cash regardless of mode of payment of said higher excise duty – Petitioner is entitled to cash refund only of the portion 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.

11. In view of above position, Government finds no infirmity in the impugned Order-in-Appeal and therefore upholds the same.

12. The revision order is therefore rejected being devoid of merit.

13. So, Ordered.

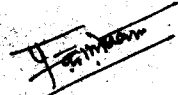


(D.P. Singh)

Joint Secretary to the Govt. of India

M/s. Hindustan Zinc Ltd.,
Unit Rajpura Dariba Mimnes,
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ATTESTED



श. क. रामेश्वरम् K. RAMESHWARAM
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वित्त मंत्रालय, राजस्व विभाग
Ministry of Finance (Deptt. of Rev.)
भारत सरकार / Govt. of India
नई दिल्ली / New Delhi

Order No. 29) /13-Cx dated 26-3-2013

Copy to:

1. The Commissioner of Customs & Central Excise, New Central Revenue Building, Statue Circle, C-Scheme Jaipur.
2. The Commissioner (Appeal-I), Customs & Central Excise, New Central Revenue Building, Statue Circle, C-Scheme Jaipur.
3. The Assistant Commissioner of Central Excise, Division, Udaipur (Raj.).
4. Shri Apurva Bhattacharya, Advocate, Bindu Bhawan, 49, Shastri Marg, Udaipur-313001.
5. Guard File.
- ✓ 6. PS to JS (Revision Application)
7. Spare Copy

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(P.K.Rameshwaram)
OSD (REVISION APPLICATION)