

**(2022) 09 DEL CK 0016**

**Delhi High Court**

**Case No:** Civil Writ Petition No. 1644 Of 2019

M/S Combitic Global Caplet Pvt.  
Ltd

APPELLANT

Vs

Union Of India & Ors.

RESPONDENT

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**Date of Decision:** Sept. 2, 2022

**Acts Referred:**

- Customs Excise and Duty Drawback Rules, 1995 - Rule 3, 4
- Foreign Trade (Development And Regulation) Act, 1992 - Section 2(e)(i), 3, 5, 6(1), 6(2), 6(3), 15, 15(1), 16, 19
- Customs Act, 1962 - Section 75(2)

**Hon'ble Judges:** Rajiv Shakhder, J; Tara Vitasta Ganju, J

**Bench:** Division Bench

**Advocate:** Rajneesh K. Verma, D K Singh, Shiva Lakshmi, Ritwik Sneha, Srishti Rawat

**Final Decision:** Disposed Of

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**Judgement**

Date of

Application", "Relevant

Period", Amount claimed, "Order by which it

was rejected in the

first instance/kept in

abeyance", "Whether the

order dated

26.04.2016

dealt with the

timeframe",,

08.04.2013,"Until

September

2012","38,35,686/-","10.05.2013

(Rejected)","Yes,,

21.08.2013,"October 2012-

March 2013","1,07,92,534/-

revised to

82,81,981/-","21.04.2014

(Rejected)","Yes,,

21.11.2013,"April 2013-

June

2013","37,20,762/-","18.02.2014

(Kept in abeyance)","Yes,,

21.04.2014,"July 2013-

September

2013","71,41,078/-","21.05.2014

(Kept in abeyance)","Yes,,

25.09.2014,"October

2013-June

2014","93,99,853/-","N/A,No,,

24.06.2015,"July 2014-

March

2015","1,00,25,567/-","19.08.2015

(Kept in abeyance)","Yes,,

15.3. Insofar as excise duty on finished products is concerned, it is either exempted  
"ab initio" or the same is reimbursed. As far as inputs are",,,,,,

concerned, they could either consist of imported components or  
indigenous/domestic components. Insofar as indigenous/domestic components

are" ,,,,,,

concerned, they bear excise duty while the imported inputs are burdened with customs duty." ,,,,,,

15.4. Thus, as regards deemed exports, the domestic supplier has the option of claiming duties on inputs via the AIR route, provided for duty" ,,,,,,

drawback. Thus, column A of the drawback schedule framed by DOR enables such suppliers to claim duty drawback, if cenvat credit is not claimed." ,,,,,,

15.5. However, if the claimant opts to re-claim excise duty through cenvat credit, the customs duty on the inputs can only be reimbursed by fixing the" ,,,,,,

brand rate based on the production of documentary evidence of having paid customs duty. Paragraph 8.5 of the FTP takes this circumstance into ,,,,,,

account. ,,,,,,

16. The 2013 Circular clarifies the position concerning the admissibility of duty drawback, in cases where cenvat credit has been availed. The 2013" ,,,,,,

Circular also clarifies that duty drawback, in terms of paragraph 8.3(b) of the FTP, including the provisions of column B of AIR of duty drawback" ,,,,,,

under the duty drawback schedule claimed by DOR, is not admissible if cenvat credit has been availed. The rationale is, that where cenvat credit has" ,,,,,,

been availed, with respect to duty paid on inputs purchased locally, then to that extent, central excise duty on inputs/components gets compensated." ,,,,,,

16.1. Therefore, the petitioner would have to give a declaration in terms of paragraph 8.5 of FTP, read with Public Notice No. 35, dated 01.03.2011," ,,,,,,

that it has not availed and will not avail cenvat credit, in respect of inputs and components used in supplies, if it is to claim duty drawback against" ,,,,,,

deemed exports. Since this is not the case as per the petitioner's own stand, it is not entitled to duty drawback on deemed exports." ,,,,,,

17. Thus, in a nutshell, where cenvat credit is taken, in that case as well, basic customs duty can be claimed, albeit, based on the brand rate of duty" ,,,,,,

drawback, which is founded on the evidence concerning payment of actual duty." ,,,,,,

17.1. This option, under Column B of the AIR Duty Drawback Schedule issued by DOR, can be availed only for physical exports. For this purpose," ,,,,,,

reference was made to paragraph 8.5 of the FTP. ,,,,,,

Analysis and Reasons: ,,,,,,

18. Before we get into the nitty-gritty of the arguments advanced by the learned counsel for the parties, it may be relevant to note certain provisions of" ,,,,,,

the FTDR Act, on which reliance is placed, in particular, by Ms Lakshmi." ,,,,,,

19. First and foremost, it needs to be borne in mind, that it is Section 3 of the FTDR Act, which empowers the Central Government to make provisions" ,,,,,,

for the development and regulation of foreign trade, by facilitating imports and increasing exports. The Central Government, in this behalf, is vested" ,,,,,,

with the power to publish an order in the official gazette.,,,,,,

20. Section 5 of the very same Act, inter alia, empowers the Central Government to formulate and announce the FTP and also amend the same by" ,,,,,,

issuing a notification in the official gazette.,,,,,,

21. Sub-section (1) of Section 6 invests in the Central Government, the power to appoint any person as DGFT." ,,,,,,

21.1. Sub-section (2) of Section 6 confers power on the DGFT to advise the Central Government in the formulation of Foreign Trade Policy. The.,,,,,,

DGFT is also made responsible for implementing the said policy.,,,,,,

21.2. Furthermore, under sub-section (3) of Section 6, the Central Government can, by an order published in the official gazette, delegate the power" ,,,,,,

exercisable by it under the FTDR Act, other than powers conferred on it, by Sections 3, 5, 15, 16 and 19, subject to such conditions as may be" ,,,,,,

stipulated in the order.,,,,,,

21.3. This power can be delegated by the Central Government, either to the DGFT or such other officer subordinate to the DGFT, as may be" ,,,,,,

specified in the said order.,,,,,,

22. Therefore, what is clear is that the Foreign Trade Policy, for any given period, can be framed and/or amended only by the Central Government." ,,,,,,

The DGFT is obliged to advise the Central Government, not only about the formulation of the Foreign Trade Policy but is also responsible for" ,,,,,,

implementing the same.,,,,,,

22.1. Although the Central Government can, by an order published in the official gazette, delegate the power conferred upon it under the FTDR Act" ,,,,,,

either on the DGFT or such other officer named therein, it cannot, inter alia, delegate the power conferred on it under Section 3, 5, 15 and 16." ,,,,,,

22.1.(a) Section 3, as noted above, concerns amongst other things, the power conferred on the Central Government to make provisions for the" ,,,,,,

development and regulation of foreign trade, while Section 5 as alluded to hereinabove, concerns the power to formulate and amend the Foreign Trade" ,,,,,,

Policy.,,,,,,

22.1.(b) Section 15 confers on a person aggrieved by an order passed by the adjudicating authority, the power to prefer an appeal to the Central" ,,,,,,

Government. Likewise, Section 16 confers the power of review on the Central Government, concerning any decision or order of the Director General" ,,,,,,

or any decision or order made by an officer subordinate to him.,,,,,,

22.1.(c) Section 19 confers on the Central Government, the power to make rules for carrying forward the provisions of the FTDR Act." ,,,,,,

23. In the instant case, the FTP was brought into force on 27.08.2009 and remained valid till 31.03.2014. Therefore, the policy ring-fence (in a figure" ,,,,,,

of speech) which is drawn for issuance of notifications, inter alia, is the FTP formulated by the Central Government, with the advice of the DGFT." ,,,,,,

23.1. Therefore, what one needs to examine is the provisions of the FTP, insofar as they concern deemed exports." ,,,,,,

23.2. Chapter 6 of the FTP, inter alia, deals with EOUs. Insofar as supplies from DTAs to EOUs are concerned, they are treated as deemed exports." ,,,,,,

This is evident on a bare perusal of paragraph 6.11(a) of the FTP. The same is extracted below:.,,,,,,

â€œEntitlement for supplies from the DTA.,,,,,,

6.11 (a) Supplies from DTA to EOU / EHTP / STP / BTP units will be regarded as â€œdeemed exportsâ€ and DTA supplier shall be eligible.,,,,,,

for relevant entitlements under chapter 8 of FTP, besides discharge of export obligation, if any, on the supplier. Notwithstanding the above," ,,,,,,

EOU / EHTP / STP / BTP units shall, on production of a suitable disclaimer from DTA supplier, be eligible for obtaining entitlements" ,,,,,,

specified in chapter 8 of FTP. For claiming deemed export duty drawback, they shall get brand rates fixed by DC wherever All Industry" ,,,,,,

Rates of Drawback are not available.â€ [Emphasis is ours.],,,,,,

Relevant

sub-para of 8.2","Benefit available as given in Para 8.3,

whichever is applicable" ,,,,,

,(a),(b),(c),,,

xxx,xxx,xxx,xxx,,

(b),Yes,Yes,Exemption,,,

xxx,xxx,xxx,xxx,,,

,,,A,B,,

Tariff

Item",Description of goods,Unit,"Drawback when Cenvat

facility has not been availed",,"Drawback when

Cenvat facility has been

availed",

,,,,"Drawback

Rate",,"Drawback

cap per unit

in Rs. (â€ž)",,"Drawback

Rate",,"Drawback

cap per unit

in Rs. (â€ž)

1,2,3,4,5,6,7

xxx xxx xxx,,,,,

CHAPTER-29 ORGANIC CHEMICALS,,,,,

xxx xxx xxx,,,,,

29350011,Sulphamethoxazole,Kg,3.3%,21.6,3.3%,21.6

xxx,xxx,xxx,xxx,xxx,xxx,xxx

29.2.(a) The petitioner seeks to buttress this plea, by relying on paragraph 6.36.1 of the HBP. The petitioner contends that a perusal of the said" ,,,,,

paragraph of HBP would disclose that the Government of India chose to deny benefits, only in respect of plant, machinery and equipment that had" ,,,,,

already been installed in the existing DTA, qua which, no claim had been lodged." ,,,,,,

29.3. Furthermore, the petitioner seeks to contend that the clue, as to whether or not the claim for drawback made under the first application" ,,,,,,

concerning unutilized goods which were available at the time of conversion of its DTA unit into a 100% EOU unit, is found in para 6.36.1 of the HBP." ,,,,,,

In this regard, our attention has been drawn to that part of the said para, which reads as follows:" ,,,,,,

“In case there is an outstanding export commitment under EPCG scheme/Advance Authorization Scheme, it will follow the procedure" ,,,,,,

laid down in Appendix 14-I-O HBP v1.” ,,,,,,

29.4. In the context of the aforesaid, it was submitted that the outstanding export commitment under the advance authorization scheme qua the" ,,,,,,

existing DTA unit was carried forward and fulfilled by the converted unit i.e., 100% EOU. The petitioner has taken a definitive stand that under the" ,,,,,,

Advance Authorization Scheme, it had procured 500kg of sulphur powder (i.e., raw material/input). According to the petitioner, permission was given" ,,,,,,

for the said purpose under Advance Authorization No.3310023511 dated 26.07.2012. The petitioner avers that at the time of conversion, out of 500kg" ,,,,,,

of sulphur powder imported, 206.520kg had been consumed and thus, the balance quantity i.e., 293.480 kg was transferred/supplied to its converted" ,,,,,,

unit i.e., 100% EOU in terms of Appendix 14-I-O of the FTP. It is further averred that the office of Joint DGFT, Panipat has redeemed the" ,,,,,,

aforementioned advance authorization via communication dated 17.06.2015. Besides this, the petitioner submits that the Government of India had even" ,,,,,,

allowed the transfer of the outstanding export commitment under the Advance Authorization Scheme, at the time of conversion of the existing DTA" ,,,,,,

into 100% EOU. ,,,,,,

29.5. Thus, based on the aforesaid, it is argued on behalf of the petitioner that it ought to be allowed duty drawback in respect of unutilized goods" ,,,,,,

which were available with the existing DTA unit and were transferred to the 100% EOU, upon conversion. Apart from the letter dated 10.05.2013," ,,,,,,

there is no response to the petitioner, regarding this stand, by the respondents." ,,,,,,

29.6. Having regard to the language of para 6.36.1 of HBP, we are of the view that the petitioner is right, that the restriction against the claim of" ,,,,,,

concession in duties and taxes applied only vis-À -vis plant, machinery and equipment that had already been installed. Thus, the fact that the petitioner" ,,,,,,

was allowed to carry forward the advance authorization to the converted unit i.e., 100% EOU and thereafter fulfil the outstanding export commitment" ,,,,,,

would, in our view, as correctly argued on behalf of the petitioner, furnish a clue that duty drawback for such goods should extend qua unutilized" ,,,,,,

goods, which were available at the time of conversion of the DTA unit into a 100% EOU." ,,,,,,

30. We also note that insofar as 17.11.2016 is concerned, it proceeds on the basis that no appeal would lie under Section 15(1) of the FTDR Act, as" ,,,,,,

the order of the Deputy DC dated 26.04.2016 was not an order passed by adjudicating authority. Having said that, the order dated 17.11.2016 takes a" ,,,,,,

position similar to that, which Deputy DC has adopted in his communication/order dated 26.06.2016 [sic: 26.04.2016]. Since we have held that the" ,,,,,,

order dated 26.04.2016 is not sustainable in law, the order dated 17.11.2016 will suffer the same fate." ,,,,,,

Conclusion: ,,,,,,

31. Therefore, for the foregoing reasons, we are inclined to hold that:" ,,,,,,

(i) The petitioner is not required to have a brand rate of duty drawback fixed, based on actual duty-paid documents for the return of basic customs" ,,,,,,

duty. To that extent, the 2013 Circular is read down." ,,,,,,

(ii) Since the impugned order dated 26.04.2016 is based on the 2013 Circular, in particular, the part which we have read down, the same cannot be" ,,,,,,

sustained and is, hence, set aside." ,,,,,,

(iii) Consequentially, the order dated 17.11.2016 will also stand quashed." ,,,,,,

32. The writ petition is disposed of, in the aforesaid terms." ,,,,,,

33. Parties shall, however, bear their respective costs." ,,,,,,