(2013) 04 MP CK 0051

Madhya Pradesh High Court (Gwalior Bench)

Case No: Writ Petition No. 5894/2011

M/s. Sterling Agro Industries Ltd. — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision: April 15, 2013

Citation: (2014) 302 ELT 353

Hon'ble Judges: S.K. Gangele, J; G.D. Saxena, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

S.K. Gangele, J.

The petitioner has filed this petition against the order dt. 9.7.2010 passed by the Revisional Authority in Appeal F. No. 375/8/DBK/10-RA-CUS & F. No. 375/9/DBK/10-RA-CUS, order dt. 30.10.2009 passed by the Commissioner (Appeal-I) Customs and Central Excise in Appeal No. (i) IND-I/257/2009 and 258/2009 also against the order dt. 30.5.2009 passed in OIO No. 01/CUS/AC/ICD/MLP/2009 and order dt. 5.6.2009 passed in OIO No. 02/CUS/AC/ICD/MLP/2009 by the Assistant Commissioner of Customs ICD, Malanpur. The petitioner is a Public Limited Company incorporated under the Companies Act. It is engaged in manufacture and export of skimmed milk powder, full cream milk powder, butter oil etc. The petitioner was sanctioned drawback and the amount was also paid to the petitioner. Later on notices were issued to the petitioner for recovery of the amount on the ground that the petitioner was not eligible to receive drawback under Rule 16 of Customs & Central Excise Duties Drawback Rules, 1995 (hereinafter referred to as the ''Rules of 1995''). The petitioner submitted reply and thereafter Assistant Commissioner of Custom ICD, Malanpur has held that the petitioner was not eligible to receive drawback. Consequently, the petitioner was ordered to deposit the amount with interest. The authority held that drawback amount was recoverable on the following grounds:-

2.1 The Applicant did not clear goods in Form ARE-2 and did not follow the procedure under Notification No. 42/2001. By not doing so, in addition to procurement of input material without payment of duty, the Applicant have availed the double benefit of duty drawback on export consignment. Therefore, the Applicant have knowingly/deliberately suppressed the fact by not clearing their exported goods under ARE-2 as required under Notification No. 43/2001.

2.2 The contention of the Applicant that, neither the assessment of Shipping Bill has been challenged nor the revenue has filed any appeal against the order of grant of drawback to the Appellant and the order passed by quasi-judicial authority cannot himself review the same at his own was held to be misleading, nor legal and is devoid of any merits as the facts regarding the quantity, FOB value, description of goods etc. mentioned in the Shipping Bills have not been disputed in the instant case. What has been alleged in the SCN is a concealment, suppression of fact of procurement of inputs without payment of duty for use in the manufacture of export goods and not exporting the said goods on the application in Form ARE-2 which make the Applicant not eligible to claim the drawback and also the judgments relied upon by the Applicant are not relevant.

2.3 The Assistant Commissioner on perusal of Rule 13 of the Customs, Central Excise and Service Tax Drawback Rules, 1995, has held that, no separate Order-Appellate Order is required to be issued.

2. Against the aforesaid order, the petitioner filed two separate appeals. Those were dismissed. Thereafter, revision petitions were filed before the government, those were also dismissed and then the petitioner filed writ petition before the Delhi High Court. The writ petition was referred firstly to Three Judge Bench and thereafter before Five Judge Bench to decide the question that whether petition was maintainable or not. Thereafter, the petitioner had withdrawn the petition and filed the present petition before this court.

3. The respondents in the return pleaded that the petitioner is not eligible for drawback because the petitioner had procured inputs viz. MS drums and multi wall papers under the Rule 19(2) of Central Excise Rules 2002 (hereinafter referred to as the ''Rules of 2002'') without payment of excise duty and used the same product in the manufacture of goods exported by the petitioner. Since the petitioner did not fulfill the conditions of Rule 19(2) of the Rules of 2002, hence, the petitioner is not eligible for drawback.

4. The respondents further pleaded that in terms of clause (ii) of second proviso to sub rule (1) of Rule 3 of Rules of 1995, no drawback is allowable if the exported goods are produced or manufactured, using imported materials or excisable materials in respect of which duties have not been paid. The petitioner paid excise duty on MS drums and multi wall paper after issuance of show cause notice. Hence, the claim of the petitioner has rightly been rejected by the authority.

5. The learned counsel for the petitioner submits that the petitioner is also entitled the benefit in accordance with condition Nos. 7(f) of Notification No. 68/2007-CUS (NT) and condition No. 8(f) of Notification No. 103/2003-CUS (NT), wherein it is mentioned that the drawback of customs is available irrespective of fact whether the exporter availed CENVAT facility or not. He further submitted that the petitioner had paid excise duty on MS drums and multi wall papers, the material which was imported by the petitioner for the purpose of manufacture and export of skimmed milk powder, full cream milk powder, butter oil etc. Hence, the petitioner is eligible the drawback facility. In support of his contentions, the petitioner relied on the following judgments:-

(i) Overseas Engineers vs. CCE, Rajkot - 2007 (215) ELT 513 (Tri).

(ii) Voltas Ltd. vs. CCE, Hyderabad - 2006 (202) ELT 355 (Tri.).

(iii) Dynamatic Technologies Ltd. Vs. Union of India (UOI),

(iv) 2005 (119) ECR 337

(v) D.C.W. Limited Vs. Asstt. Commissioner of Central Excise, .

(vi) 1991 (36) ECR 607 .

(vii) 2005 (179) ELT 355 .

(viii) 2002 (149) ELT 164

(ix) Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive),

(x) Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, .

(xi) Vitsse Export Import vs. CCE (EP) Mumbai - 2008 (224) ELT 241 (Tri.).

6. Contrary to this, learned counsel appearing on behalf of the department has contended that the petitioner is not eligible for drawback because it had not paid excise duties on MS drums and multi wall papers initially, hence, the petitioner is ineligible to receive the benefits in accordance with provisions of Rule 19(2) of the Rules of 2002. It is further contended by the learned counsel that the petitioner had contravened the condition Nos. 7(f) of Notification No. 68/2007-CUS (NT) and condition No. 8(f) of Notification No. 103/2003-CUS (NT) of Central Excise Department. Hence, no drawback is admissible to the petitioner and the appellate and revisional authorities have rightly considered the case of the petitioner. In support of his contentions, learned counsel relied on the following judgment:-

(i) Rubfila International Ltd. vs. Commissioner - 2008 (224) ELT A133 (SC).

(ii) Commissioner of Central Excise, Chandigarh-I Vs. Mahaan Dairies, .

(iii) Novopan India Ltd., Hyderabad Vs. Collector of Central Excise and Customs, Hyderabad, .

(iv) Sesame Foods Private Limited Vs. Union of India (UOI) and Others, .

(v) Union of India and others Vs. Jain Shudh Vanaspati Ltd. and another, .

(vi) Venus Enterprises Vs. Commissioner of Customs, Airport and Customs, Excise and Service Tax, Appellate Tribunal, Southern Regional Bench, .

7. The question for consideration before this court is that whether the petitioner is eligible for drawback which was granted earlier to the petitioner.

8. It is an admitted fact that the petitioner imported MS drums and multi wall papers the material used in the manufacture of skimmed milk powder, full cream milk powder, butter oil etc. The petitioner initially did not pay excise duty on the aforesaid material. Subsequently, a show cause notice was issued to the petitioner and the petitioner paid the excise duty on MS drums and multi wall papers on 28.4.2009.

9. Rule 3 of the Rules of 1995 defines ''drawback'', which is as under:-

3. Drawback:

(1) Subject to the provisions of

(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder,

(b) the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, and

(c) these rules,

a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government:

Provided that where any goods are produced or manufactured from imported materials or excisable materials on some of which only, duty chargeable thereon has been paid and not on the rest, or only a part of the duty chargeable has been paid; or the duty paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962), and the rules made there under, or of the Central Excise Act, 1944 (1 of 1944) and the rules made there under, the drawback admissible on the said goods be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained:

Clause (ii) of second proviso to Rule (3)(1) of the Rules of 1995 prescribes that no drawback shall be allowed if the goods are produced or manufactured using imported materials or excisable materials in respect of which duties have not been paid.

10. Rule 16 of the Rules of 1995 prescribes the repayment of erroneous or excess payment of drawback and interest. The relevant is as under:-

Where an amount of drawback and interest, if any, has been paid erroneously or the amount so paid in excess of what the claimant is entitled to, the claimant shall, on demand by a proper officer of Customs repay the amount so paid erroneously or in excess, as the case may be, and where the claimant fails to repay the amount it shall be recovered in the manner laid down in subsection (1) of Section 142 of the Customs Act, 1962 (52 of 1962).

11. Rule 19 of the Rules of 2002 prescribes export without payment of duty. The aforesaid rule is as under:-

Rule 19. Export without payment of duty.-(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

12. It is an admitted fact that the petitioner had paid excise duty after receiving the show cause notice.

13. Condition No. (7) of Notification No. 68/2007-CUSTOMS dt. 16.7.2007 issued by the Govt. of India, Ministry of Finance, in exercise of powers conferred by subsection (2) and (3) of Section 75 of the Customs Act, 1962, sub section (2) and (2A) of Section 37 of the Central Excise Act, 1944 (1 of 1944), and Section 93A, and sub-section (2) and (3) of Section 94 of the Finance Act, 1994 (32 of 1994) read with Rules 3, 4 and 5 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995, prescribes that the rates of drawback specified in the Schedule shall not be applicable to export of a commodity or product if such commodity or product is manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002. Similarly, condition No. 8(f) of notification No. 103/2008 CUSTOMS dt. 29th August 2008 prescribes as under:-

(8) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is-

(f) manufactured or exported in terms of sub-rule (2) of rule 19 of the Central Excise Rules, 2002.

14. The aforesaid notifications prescribe that the drawback shall not applicable if the goods are manufactured or exported in terms of sub-rule (2) of rule 19 of the Rules

of 2002. The aforesaid rules, as quoted above, give the facility to the manufacturer to export the goods without payment of duty. In the present case, the respondents themselves admitted the fact in the return that the petitioner deposited CENVAT credit availed on duty amount on inputs i.e. MS drums in question on 28.4.2009.

15. It is further pleaded by the department in the return that the petitioner had agreed to deposit the duty foregone on the inputs i.e. packing materials in question and deposited Rs. 22,06,762/- on duty and Rs. 2,57,385/- on interest on 28.4.2009. The argument of the department is that there is no provisions under the Statute for reversal of duty foregone. The revisional authority also observed that because the petitioner availed the facility of Rule 19(2) of the Rules of 2002, hence, he is not eligible to receive the benefit of drawback. However, proviso to Rule 3(1) of the Rules of 1995 prescribes that if the goods are produced or manufactured from imported materials or excisable materials on some of which only, duty chargeable thereon had been paid and not on the rest, the drawback admissible on the said goods be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained. In the present case, the petitioner used packing material to manufacture and export of skimmed milk powder, full cream milk powder, butter oil etc. The aforesaid packing material was imported by the petitioner. The petitioner deposited the CENVAT credit and excise duty on the aforesaid material. In such circumstances, in our opinion, the petitioner is eligible to receive benefits of drawback in terms of proviso to Rule 3(1) of the Rules of 1995.

16. The argument of the revenue that since the petitioner paid the excise duty or CENVAT credit subsequently after issuance of show cause notice, hence, the petitioner is not eligible for the aforesaid benefit is not acceptable because there is no such condition mentioned in the proviso to Rule 3(1) of the Rules of 1995 as quoted above.

17. Hon''ble Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd., Nagpur Vs. Collector of Central Excise, Central Excise Collectorate, Nagpur, has held as under in regard to availability of reversal of Modvat credit permissible to avail exemption:-

We see no reason why the assessee cannot make a debit entry in the credit account before removal of the exempted final product. If this debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in the manufacture of the final exempted product will stand deleted in the accounts of the assessee. In such a situation it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A. In other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of the duty paid on the inputs used in manufacture of these goods.

18. Hon''ble Supreme Court further in the case of Commissioner of Central Excise, Mumbai-I Vs. Bombay Dyeing and Mfg. Co. Ltd., has held as under:-

There is no merit in this civil appeal. Under the notification, mode of payment has not been prescribed. Further, exemption is given to the final product, namely, grey fabric under the Central Excise Act, 1944, levy is on manufacture but payment is at the time of clearance. Under the Act, payment of duty on yarn had to be at the spindle stage. However, when we come to the Exemption Notification No. 14/2002-C.E., the requirement was that exemption on grey fabrics was admissible subject to the assessee paying duty on yam before claiming exemption and subject to the assessee not claiming CENVAT credit before claiming exemption. The question of exemption from payment of duty on grey fabrics arose on satisfaction of the said two conditions. In this case, payment of duty on yarn on deferred basis took place before clearance of grey fabrics on which exemption was claimed. Therefore, payment was made before the stage of exemption. Similarly, on payment of duty on the input (yarn) the assessee got the credit which was never utilized. That before utilization the entry has been reversed which mounts to not taking credit. Hence, in this case, both the conditions are satisfied. Hence item no. 1 of the table to Notification No. 14/2002-C.E. would apply and accordingly the grey fabrics would attract nil rate of duty.

On the basis of above discussion, in our opinion, because the petitioner had paid the excise duty subsequently to issuance of show cause notice and deposited the CENVAT credit, he was eligible the benefit of drawback in accordance with the proviso to Rule 3(1) of the Rules of 1995. Consequently, the petition is disposed of with the following directions:-

(i) That the order dt. 9.7.2010 passed by the Revisional Authority in Appeal F. No. 375/8/DBK/10-RA-CUS & F. No. 375/9/DBK/10-RA-CUS, order dt. 30.10.2009 passed by the Commissioner (Appeal-I) Customs and Central Excise in Appeal No. (i) IND-I/257/2009 and 258/2009 also against the order dt. 30.5.2009 passed in OIO No. 01/CUS/AC/ICD/MLP/2009 and order dt. 5.6.2009 passed in OIO No. 02/CUS/AC/ICD/MLP/2009 by the Assistant Commissioner of Customs ICD, Malanpur are hereby quashed and the matter is remanded back to the authority to calculate the benefit of drawback available to the petitioner in terms of proviso to Rule 3(1) of the Rules of 1995.

No order as to costs.