(2015) 04 KAR CK 0155

In the Karnataka High Court

Case No : Writ Petition No. 40357/2014 and Writ Petition Nos. 49414-49418/2014 and 49419-49422/2014 (T-TAR)

Acer India Pvt. Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 08-04-2015

Acts Referred:
Customs Act, 1962 — Section 51, 74, 75A

Citation : (2015) 325 ELT 519

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Shivadass G., for the Appellant; K.N. Mohan, SC, Advocates for the Respondent

Judgement

Aravind Kumar, J.

1. Petitioner is seeking for quashing of order bearing F.No.609/252/2008-DBK dated 13.05.2014 (Annexure-A) whereunder applications filed by petitioner for condoning delay in filing the application seeking for duty drawback exemption as is permissible under Section 74 of the Customs Act, 1962 has been rejected on the ground that applications filed by the petitioner is beyond the prescribed period. Petitioner is also seeking for further direction to fourth respondent to allow duty drawback claimed by petitioner under Section 74 of the Customs Act, 1962 and in the alternate, petitioner has prayed for the matter being remanded to first respondent for adjudication afresh after quashing of the order dated 13.05.2014 (Annexure-A).

2. I have heard the arguments of Sri G Shivadass, learned Advocate appearing for petitioner and Sri K.N. Mohan, learned panel counsel appearing for respondents. Perused the records as also statement of objections filed by respondents.

3. Petitioner is engaged in manufacturing, trading and export of computers and

various other electronic items. In the course of its business, petitioner imported personal computers and accessories from China through 48 bills of entry. Imports have taken place at Chennai Port on payment of applicable duties and the goods so imported are received at their factory at Pondicherry. Subsequently, goods imported were not taken to be used domestically and as such, after making certain value additions, petitioner claims to have exported said goods to Bangladesh against purchase orders received from its customers located at Dhaka, Bangladesh and having exported the same under 10 shipping bills during the period November, 2006 to 2007 as per Annexure-B, petitioner is said to have received payment in free foreign exchange through irrevocable Letter Of Credit (LOC). Petitioner claims that consignments have been properly examined, cleared and approved by Land Customs Station at Petrapole, West Bengal at the time of export. On account of goods imported by the petitioner having been exported to Bangladesh, petitioner raised its claim before fifth respondent for drawback of the duty paid at the time of importation. On account of authorized signatories to file duty drawback claim being based at Head Office at Bengaluru and also claim required to be furnished with original copies of shipping bills filed at Petrapole, West Bengal and Bill of Entry filed at Chennai, collection of original copies of documents filed at various locations resulted in a delay ranging from 6 months to 13 months as against time limit of three months prescribed under Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. Hence, petitioner is stated to have presented the duty drawback claim application before fifth respondent belatedly which was not accepted by fifth respondent on the ground that claims were time barred.

4. Hence, petitioner approached first respondent and filed representation dated 04.01.2008 (Annexure-C) with a prayer for condonation of delay in filing the drawback claims in respect of six shipping bills and likewise in respect of another set of 4 shipping bills filed for export of goods with the same port. The application/representation dated 04.10.2008 (Annexure-F) was also submitted by the petitioner seeking for condonation of delay. After extending personal hearing to petitioner, first respondent by communication dated 13.05.2014 (Annexure-A) intimated the petitioner rejection of claim or non condonation of delay by the authorities enclosing therewith orders/reasons assigned for rejection of claims/ prayer for condonation of delay and as such, petitioner is before this Court.

5. It is the contention of learned Advocate appearing for petitioner that when authorities have categorically stated that exportation of goods have taken place and same having been confirmed by the jurisdictional Commissioner of Customs, first respondent ought to have considered the prayer for condonation of delay by a pragmatic view and it could not have rejected genuine claim of petitioner by pedantic approach and as such, he seeks for quashing of the order passed by first respondent and also seeks for a direction to fourth respondent to allow duty drawback. He would also elaborate his submission by contending that first respondent has now amended extant Rules namely, Re-export of Imported Goods (Drawback of Custom Duties) Rules, 1995 (for short ''the Rules, 1995'') in

particular, Rule 5 by amendment dated 26.05.1995 whereunder Rule 5 which provides for manner and time of claiming drawback on goods exported other than by post has undergone change namely, earlier period fixed for three months, has been now extended up to six months, in all, nine months is allowed and as such, claim of petitioner involved in these writ petitions ranging from 6 months to 13 months was with a plausible explanation which ought to have been accepted by first respondent particularly when the authorities themselves have confirmed the exportation of consignment, petitioner cannot be deprived of the substantial benefit to which it is entitled to.

6. Per contra, Sri K.N. Mohan, learned panel Advocate appearing for respondents by reiterating the pleas urged in the statement of objections would support the impugned order and submits that inconsistent stand taken by the petitioner and its Custom House Agent was the prime reason which swayed in the mind of first respondent to reject petitioner''s claim for duty drawback. Hence, he prays for rejection of these writ petitions.

7. Having heard the learned Advocates appearing for parties and on perusal of the records, it would emerge that goods which have been exported by the petitioner under the Bill of Entries (referred to in the impugned order - Annexure-A) were undisputedly imported and it was not put into use domestically and petitioner is stated to have exported the same to Bangladesh through the Petrapole, West Bengal. Bills of Entries and Bills of Exchange would fortify the stand of the petitioner that goods after importation with value addition has been exported.

8. Under Section 74 of the Customs Act, 1962 drawback allowable on re-export of duty paid goods is entitled to be drawn on such exportation taking place and on account of goods imported having been exported by the petitioner, after making such value additions. Application under Rule 5 of the Rules, 1995 came to be submitted by petitioner before fifth respondent which was stated to have not been accepted on account of same being belated. Rule 5 of the Rules, 1995 mandates that claim for drawback under the said Rules should be filed within three months from the date on which an order permitting clearance and loading of goods for exportation under Section 51 is made by the proper Officer of Customs and proviso thereto enables the Assistant Commissioner of Customs or Deputy Commissioner of Customs as the case may be, to permit filing of such application claiming drawback beyond the period of three months and within further period of 3 months subject to the exporter satisfying the said Officer/s by giving sufficient cause for such delay. In other words, the exporter would be entitled to file a claim for duty draw back within an outer limit of six months by explaining the delay. In the event of delay being beyond six months, power to relax the prescribed period is available to the Central Government under Rule 7A of the Rules, 1995 and on such cause being shown, Central Government if satisfied that in relation to the export of any goods, the exporter or his authorized agent for reasons beyond his control, failed to seek for drawback

within the period prescribed under Rule 5, exempt such exporter or agent from the provisions of Rule 5 or in other words, said authority it would be entitled to condone the delay.

9. In the instant case, reasons assigned by petitioner for filing applications beyond the period prescribed is on account of its inability to collect the documents at a time and file the same before authorities. Reasons have been explained or cause has been shown in the representations/applications dated 04.01.2008 and 04.10.2008 (Annexures-C and F). At the first instance, petitioner submitted the application for duty drawback before jurisdictional Commissioner of Customs and on same being refused to be taken on record, petitioner approached first respondent by filing an application dated 04.10.2008. Third respondent forwarded said application dated 04.01.2008 submitted by the petitioner for condonation of delay to the Commissioner of Customs (Preventive), Kolkatta on 11.01.2008 vide Annexure-D and has called upon the jurisdictional Commissioner to furnish factual report who in turn has stated by his reply dated 24.03.2008 (Annexure-E) that after having ascertained that exports under 6 numbers of bills of export were effected by the petitioner through Petropole L.C.S. after original examination of the goods in the presence of Assistant Commissioner (Cargo), PTPL, L.C.S. in terms of Section 74 of the Customs Act, 1962. In other words, it would indicate that genuineness of the claim made by the petitioner is not doubted by the authorities. Further, authorities also do not dispute the factum of exportation of goods which have been imported and which is the subject matter of duty drawback having been exported by the petitioner. In fact, when the claim submitted by the petitioner was not accepted by the jurisdictional Commissioner, petitioner had approached first respondent. Third respondent by communication dated 28.09.2012 (Annexure-K) has intimated the Commissioner of Customs (Preventive), Kolkata - fourth respondent that such refusal would be irregular and even if time barred applications are to be received they came to be dealt with in accordance with the extant rules and such claim cannot be refused to be received, but if there is delay, it has to be dealt by Ministry.

10. The reason assigned by the first respondent to reject the prayer for condonation of delay of petitioner''s claim as can be seen from the impugned order is that Custom House Agent of the petitioner had informed the first respondent of having forwarded requisite documents after having effected shipment to the petitioner and as such, cause shown by the petitioner was disbelieved for not being entertained or delay being condoned. In view of the fact that first respondent having amended Rule 5 of the Rules, 1995 and extended the period from 6 months to 9 months and the power available under Rule 7A to the Central Government to relax in relation to export of any goods if the Central Government is satisfied that reasons assigned by the exporters or his authorized agent for belatedly filing an application for duty drawback, it is empowered to relax the time limit or in other words, it is empowered to condone the delay.

11. The Division Bench of this Court under similar circumstances in the case of Union of India v. Wipro Limited reported in (2010) 255 ELT 226 (Kar.) has held that direction issued by the learned Single Judge of this Court to examine the application for condonation of delay is not an order which requires to be interfered and as such, while confirming order of learned Single Judge, has affirmed the view that non filing of application for condonation of delay was beyond the control of respondent therein and Rule 15 of Customs and Central Excise Duties Draw Back Rules, 1971 was attracted to the facts and circumstances of the said case which order came to be affirmed by Hon''ble Apex Court in SLP (Civil) No. 17492/2007. This would clearly indicate that authorities while examining the application for relaxing or for condonation of delay has to be more pragmatic or in other words if it is found that claim is not a false claim or in other words, it is genuine claim, they would be liberal in condoning delay. However, if authorities were to find that claim itself is doubtful, they would be within their domain to reject the application while considering the claim for relaxation of time or for condonation of delay as is permissible under Rule 7A of the Rules, 1995. While examining the sufficiency of cause shown by the exporter or his authorized agent, liberal approach ought to be adopted and technicalities even if any should yield to substantial justice.

12. In fact, under similar circumstances, Division Bench of Kolkata High Court in the case of Commissioner of Customs, Mumbai v. Terai Overseas Ltd. reported in (2003) 156 ELT 841 (Cal.) has held that while considering an application for drawback, documents filed in support of the claim should be considered liberally and drawback cannot be denied on mere technicalities or by adopting narrow and pedantic approach, since duty drawback is an incentive scheme. In the instant case, undisputedly petitioner having carried out exportation after making value addition of imported goods and has earned foreign exchange for the Country, dicta laid down by High Court of Kolkata is squarely applicable to the facts of the present case and this Court is in respectful agreement with the said view. It has been held by the Kolkata High Court which reads as under:

"21. On a reasonable construction of the various provisions of the Drawback Rules, this Court is of the opinion that the same is an incentive oriented scheme for augmenting export and claim for drawback cannot be withheld on the basis of mere technicality. This Court finds that if it is ultimately found that benefit of the Drawback Claim has been given to a party unauthorisedly, there are provisions under Rule 16(a) of the said Rules for its recovery where the export proceeds were not realized. Therefore, at the time of granting the Drawback Claim, the authorities have to proceed on a reasonable basis and cannot accept a narrow and pedantic approach. Apart from that, this Court also finds that the Tribunal held that the rebate of duty can be claimed on any imported or excisable materials used in the manufacture of certain goods which are manufactured in India and exported. Therefore, the main purpose of the said Rules is to boost export and earn foreign exchange. Admittedly, in the instant case, the export had taken place and the foreign exchange involved in the process had also been earned.

23. As the Court has to interpret the said rule, the language of Rule 13(2) assumes considerable importance. The said sub-clause 2 used the expression ''should'' instead of the expression ''must'' or ''shall'', the express shall has been used in Rule 13(3) and Rule 13(3) provides that if the claim for drawback is incomplete in any material particulars or is without any document specified in sub-rule (2), the same shall be returned to the claimant with a deficiency memo in the form prescribed by the Commissioner of Customs within 10 days and shall be deemed not to have been filed for the purpose of Section 75A of the Act."

13. As to whether petitioner is entitled for drawback or not will have to be examined by first respondent and it would be within the domain of the authorities to consider such claim keeping in mind the observations made hereinabove. Hence, without expressing any opinion on the same, it would suffice if impugned order is set aside and matter is remitted to first respondent with a direction to consider the applications filed by the petitioner at Annexures-C and F dated 04.01.208 and 04.10.2008 and pass orders thereon by keeping in mind observations made herein above and Rule 7A as well as the amendment which has been effected to Rule 5 of the Rules, 1995.

First respondent shall complete the exercise expeditiously at any rate within 3 months from the date of receipt of copy of this order.

Ordered accordingly. No costs.

