

(2004) 03 BOM CK 0084

In the Bombay High Court

Case No : Writ Petition No. 3003 of 2002

Arviva Industries (I) Ltd.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 15-03-2004

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37B

Citation : (2004) 5 BomCR 664 : (2004) 94 ECC 394 : (2004) 167 ELT 135

Hon'ble Judges : R.M. Lodha, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : D.B. Shroff and R.G. Sheth and Pradeep M.K., instructed by Sheth and Co, for the Appellant; R.V. Desai and A.S. Rao, instructed by H.D. Rathod, for the Respondent

Judgement

R.M. Lodha, J.—The petitioner has approached this Court by challenging the Circular No. 39/2001, dated 6th July, 2001 to the extent it affects the rights of the petitioner prejudicially by making it operative retrospectively and the orders at Exhibits A-1 to A-7 whereby the petitioner's brand rate applications have been rejected.

2. The petitioner is engaged in the manufacture/export of Dyed Polyester Viscos suiting fabrics (for short, "the processed fabrics"). In the Export and Import Policy for the period 1997-2002 Duty Entitlement Pass Book Scheme (DEPB Scheme) was introduced. The objective of DEPB Scheme was to neutralise the incidence of basic customs duty and surcharge thereof on the import content of export product. The neutralisation was to be provided by way of grant of duty credit against the export product. The duty credit under the DEPB scheme was to be calculated by taking into account the deemed import content of the said export product as per the Standard Input-Output Norms (SION) and determine basic custom duty and surcharge thereof payable on such deemed imports. It also provided that the value addition achieved by export of such product should be taken into account while determining the rate of duty credit under the

Scheme. The DEPB Scheme clarified that the exports made thereunder shall not be entitled for drawback. It appears that the Central Board of Excise and Customs (for short, "the Board") vide its Circular No. 68/97, dated 2-12-1997 extended brand rate of drawback scheme under DEPB scheme. It was done so because the exporters made representations to the effect that wherever fibre goods exported by them were not liable to central excise duty, the exporters were unable to avail of Modvat Credit of additional customs duty (CVD) paid in cash on imported inputs, or excise duty paid on indigenous inputs, utilised in the production of export goods and that the duties suffered by them were not fully compensated to them at the time of export. Acting on these representations of the exporters, the Board decided that the exports made under the DEPB scheme of those products which cannot avail Modvat credit on additional duty of customs (CVD) paid in cash on imported inputs or excise duty paid on indigenous inputs as no excise duty was payable on the export goods, would be entitled for payment of brand rate of drawback. The brand rate of drawback was to be fixed by the Director of Drawback against additional customs duty/excise duty suffered on Inputs, on submission of proof of payment of duty by the exporters. The Board thereafter by Circular No. 39/99, dated 25-6-1999 issued the following circular :

"Circular No. 39/99-Cus., dated 25-6-1999

(From F.No. 605/145/97-DBK)

Government of India

Ministry of Finance (Department of Revenue)

New Delhi.

Subject: Extension of Brand Rate of Drawback Scheme to exports under DEPB Scheme - Reimbursement of Additional Customs Duty (CVD) paid in cash on imported inputs and Excise duty paid on indigenous inputs in export goods - Regarding.

Various representations have been received from Trade/Exporters that wherever final goods exported by them are liable to compounded levy of Central Excise duty, in such cases, the exporters are unable to avail of Modvat credit of additional customs duty (CVD) paid in cash on imported inputs, or excise duty paid on indigenous inputs, utilised in the production of export goods; and thus the duties suffered by them are not fully compensated to them the time of export. Such situation presently pertains to steel re-rolling industry (Notification No. 33/97-C.E., dated 1-8-1997 refers) and processed fabrics [Notification No. 36/98-C.E., dated 10-12-1998 and 44/98-C.E. (N.T.), dated 10-12-1998 refer].

2. In view of the above, the issue has been examined in the board and it has been decided that the exports made under DEPB Scheme of those products which cannot avail Modvat credit of the additional duty of Customs (CVD) paid in cash on imported inputs, or excise duty paid on indigenous inputs, will be eligible

for payment of brand rate of Drawback to be fixed by the Directorate of Drawback against additional customs duty/excise duty suffered on inputs, on submission of proof of payment of duty. This will be applicable to exports of re-rolled steel products which are covered under Notification No. 33/97-C.E., dated 1-8-1997 and processed fabrics, which are covered by Notification No. 44/98-C.E. (N.T.), dated 10-12-1998.

3. Circular No. 68/97-Cus., dated 2-12-1997 shall stand amended as above. Other provisions of that Circular shall be applicable to the products consideration herein....."

3. It is not in dispute before us that in so far as the petitioner was concerned, it was not eligible for payment of brand rate of drawback under the Circular No. 68/1997 as it was able to avail Modvat credit. Vide Circular No. 68/97 the condition precedent for eligibility for payment of brand rate of drawback was non-availability of Modvat credit and since the petitioner was availing of Modvat credit it was not eligible for payment of brand rate of drawback. With effect from 16th December, 1998, the petitioner was unable to avail of Modvat credit in view of the notifications issued by the Ministry of Finance, Government of India. For the subject exports for the period from September, 1999 to January, 2001, it is petitioner's case that as it did not avail Modvat credit, it was eligible for payment of brand rate on drawback vide Circular No. 39/1999 and in fact for some of the shipping bills the petitioner did receive payment of brand rate of drawback fixed by the Directorate of Drawback against excise duty suffered on inputs. The Board, however, subsequently on 6th July, 2001 issued Circular No. 39/2001. Since the said circular is under challenge to the extent stated above, we deem it fit to reproduce the said circular. It reads thus :

"Circular No. 39/2001-Cus., dated 6-7-2001

(From F.No. 605/35/2001-DBK)

Government of India

Ministry of Finance (Department of Revenue)

Central Board of Excise & Customs, New Delhi

Subject: Extension of Brand Rate of Drawback Scheme to exports under DEPB Scheme against DEPB-cum-Drawback shipping bills - Regarding.

Attention is invited to Board's Circular Nos. 68/97-Cus., dated 2-12-1997 and 39/99-Cus., dated 25-6-1999 1999 (111) E.L.T. T33 (Both issued from F.No. 605/45/97-DBK in terms of which facility of brand rate of Duty Drawback Scheme was extended to exports made under DEPB Scheme against DEPB-cum-Drawback Shipping bills subject to conditions specified in the said two Circulars.

2. Certain doubts have arisen in regard to the types of cases where-under the facility of both DEPB as well as Brand Rate of Drawback will be admissible. It has been observed that EXIM Policy provisions are very clear and indicate that

exports made under DEPB Scheme shall not be entitled for Drawback. However, the additional customs duty paid in cash on inputs under DEPB can be claimed for adjustment/relief by way of Modvat Credit or Duty Drawback as per rules of DOR. Under duty exemption schemes, facility of drawback for duties paid if any was extended only for inputs not covered by SION or inputs not permitted under Advance licences to avoid unintended benefit. It is accordingly clarified that facility of Brand Rate of Drawback for export made under DEPB Scheme against DEPB-cum-Drawback shipping bills shall be allowed only in the following situations :

(a) where the additional duty of customs has been paid in cash on inputs imported under DEPB Scheme used in export products & no MODVAT (CENVAT) has been availed for such additional duty paid; and

(b) where excise duty is paid on indigenous inputs not specified in relevant SION, but used in export product and no MODVAT (CENVAT) has been availed for such excise duty paid.

3. Brand rate of drawback in such cases shall be considered irrespective of whether the export product is dutiable/excisable or not.

4. Circular Nos. 68/97-Cus., dated 2-12-1997 and 39/99-Cus., dated 25-6-1999 shall stand corrected to the extent mentioned above in the preceding paragraphs and other conditions of the said two circulars shall continue to apply.

5. All pending brand rate applications for exports made under DEPB Scheme against DEPB-cum-Drawback shipping bills may be processed/disposed of accordingly.

6. Decisions in respect of past exports made against DEPB-cum-Drawback shipping bills, where brand rate of drawback has already been granted, shall be examined separately and suitable instructions shall follow.

7. Suitable instructions/Standing Order may be issued for the guidance of Trade/field staff."

4. To complete the narration of facts we may notice here that the deemed Modvat Credit Scheme was introduced by Notification No. 29/1996, dated 10th September, 1996 inter alia in respect of yarn and processed fabrics. Vide this notification, the manufacturer of processed fabrics as well as exporters were entitled to deemed Modvat credit. Thus, as exporters of processed fabrics got DEPB under the DEPB Scheme and deemed Modvat credit vide Notification No. 29/1996. By virtue of Notification No. 44/98, dated 10th December, 1998 the compounded levy scheme on textile fabrics was introduced and thereby the, scheme of deemed Modvat credit came to an end with effect from 16th December, 1998. By telex dated 16th December, 1998, the Ministry of Finance informed the exporters that till an all India industry rate of drawback on processed fabrics was determined, the exporters of fabrics processed by independent processors may file special brand rate fixation applications as per

the Drawback Rules, 1995. It is petitioner's case that in respect of 18 shipping bills, listed in Exhibit B-1, the petitioner received orders on diverse dates in 2000 allowing drawback at the rates indicated therein. We may notice that out of these 18 shipping bills, 7 bills have been disallowed vide Exhibits A-1 to A-7. For the period between September, 1999 and January, 2001, the petitioner submitted 129 shipping bills for claim of brand rate of drawback as per the Circular No. 39/1999, dated 25th June, 1999. In 45 shipping bills listed in Exhibit "C" out of 129 shipping bills, according to the petitioner, due to oversight/inadvertence the words "Cum Drawback" after the word "DEPB" left to be typed. These 45 shipping bills were rejected. Some other shipping bills were also rejected as the word "DEPB-cum-Drawback" were not specifically mentioned. The petitioner challenged these orders by filing Writ Petition No. 2532/2001. By the order dated 14th January, 2002 this Court set aside all these orders being in violation of principles of justice and remitted the matter back to the concerned Authority for reconsideration. On reconsideration, by the impugned orders dated 29th October, 2002 Exhibits A-1 to A-7, 7 shipping bills in respect of which the petitioner had already received the drawback were rejected. The said orders are based on Circular No. 39/2001. Copies of these orders were forwarded to the Commissioner of Customs, JNPT, to recover the drawback amount. This is how the petitioner is aggrieved and approached this Court in extraordinary jurisdiction.

5. Mr. D.B. Shroff, the learned Counsel appearing for the petitioner submitted that all the exports were reflected between September, 1999 and January, 2001 i.e. prior to the issuance of the Circular No. 39/2001. The learned Counsel submitted that the petitioner made firm commitments and exported the goods acting on the promise given by the Government and that the circular cannot be amended with retrospective effect so as to take away vested right conferred on the petitioner. The learned Counsel also submitted that in respect of the drawback claims which had already been completed, and drawback had been given pursuant to the earlier circular, the drawback cannot now be rejected or claimed back under the subsequent Circular No. 39/2001. The learned Counsel submitted that the subsequent Circular No. 39/2001 is not clarificatory. It is so because the circular No. 39/1999 does not state that drawback would be given only after SION did not cover the inputs. Rather circular shows that it was issued to make available brand rate of drawback, over and above the DEPB where Modvat credit was not available. According to the learned Counsel, by the Circular No. 39/2001, there is total change in the stand taken in the earlier Circular No. 39/1999 and totally new conditions have now been imposed for the first time. Such circular can never be clarificatory or retrospective in nature. In support of his submissions, the learned Counsel relied upon :

- (1) Gandhi Sons and Ors. v. Union of India, 2002 (81) ECC 261;
- (2) Eicher Motors Limited and Another Vs. Union of India and Others Etc., ;
- (3) Mazda International (P) Ltd Vs. Union of India, ;

(4) H.M. Bags Manufacturer Vs. Collector of Central Excise, , and

(5) The Paper Products Ltd. Vs. Commissioner of Central Excise, .

6. On the other hand, the respondents stand in opposition to the writ petition is that Circular No. 68/97 was aimed at operationalising the provisions of the EXIM policy pertaining to DEPB Scheme whereby brand rate of drawback would be admissible to exporters who were unable to avail Modvat/Cenvat credit of additional customs duty paid in cash on imported inputs or excise duty paid on indigenous inputs, utilised in the manufacture of product exported under DEPB scheme. The said circular has to be read harmoniously with the extent EXIM policy provisions. According to the respondents, under DEPB Scheme the exporter is entitled to grant on basic export duty on surcharge of deemed basis on the inputs mentioned in SION published in the Handbook of Procedures which go into the production of export products. The exports under DEPB scheme are not entitled to drawback. This was done as DEPB was considered to be an alternative scheme. However an exception was made in cases where the additional customs duty was paid in cash on inputs under DEPB, the same was to be adjusted as Modvat/Cenvat or rebated through the drawback in terms of instructions issued vide Circular No. 68/97. The respondents have averred that due to misinterpretation of Circular No. 68/97 an error crept into the system whereby exporters who procured their SION inputs indigenously on payment of central excise duty and whose export product was not chargeable to Central Excise Duty, started availing double/unintended benefit. Such exporter got DEPB credit at the rate specified for the export product in DEPB schedule on the one side, and in addition in respect of indigenously procured Central Excise duty paid inputs specified in SION, they also got brand rate of drawback. The objective of allowing brand rate of drawback as per the case of the respondents was only to provide rebate of additional customs duty if the same was paid in cash duty (CVD) and rebate on Central Excise duty paid in respect of the indigenous inputs not mentioned in SION. By issuing Circular No. 39/2001, the Customs Department dispelled that and corrected the anomaly which crept into the system through misconstruction of Circular No. 68/97 and the extent EXIM policy provisions.

7. Mr. R.V. Desai, the learned Senior Counsel appearing for the respondents, in the light of the aforesaid stand taken in the reply affidavit supported the Circular No. 39/2001 by submitting that by this circular the doubts about brand rate of drawback, in respect of exporters under DEPB have been clarified and dispelled. He contended that in the light of the EXIM policy, 1997-2002, if the Circular No. 68/97 is read, the brand rate of drawback was allowed in the cases where (i) the CVD was paid in cash, and (ii) Central Excise duty in respect of non-SION inputs was paid and no Modvat (Cenvat) was availed and that is what has been clarified by the Circular No. 39/2001. The learned Senior Counsel, relying upon the judgment of the Supreme Court in Union of India (UOI) Vs. Aflon Engineering Corporation, submitted that the clarification made by the Board vide Circular No.

39/2001 must be read having been in existence from the date the Circular No. 68/97 was issued.

8. In the EXIM policy for the period 1997-2002 the DEPB scheme was introduced. Paragraph 7.25 of EXIM policy that provides for DEPB, scheme reads thus :

"7.25 The objective of Duty Entitlement Passbook Scheme is to neutralise the incidence of basic customs duty and surcharge thereof on the import content of the export product. The neutralization shall be provided by way of grant of duty credit against the export product. The duty credit under the scheme shall be calculated by taking into account the deemed import content of the said export product as per Standard Input-Output Norms and determine basic custom duty and surcharge thereof payable on such deemed imports. The value addition achieved by export of such product shall also be taken into account while determining the rate of duty credit under the Scheme.

Under the Duty Entitlement Pass Book (DEPB) Scheme, an exporter shall be eligible to claim credit as a specified percentage of fob value of exports made in freely convertible currency. The credit shall be available against such export products and at such rate as may be specified by the Director General of Foreign Trade by a Public Notice issued in this behalf,

Any item except those mentioned as restricted in ITC (HS) classifications of Export and Imports items shall be allowed for import without payment of basic customs duty and surcharge thereof as well as additional duty of customs, against the credit under a Duty Entitlement Pass Book (DEPB). The holder of Duty Entitlement Pass Book (DEPB) shall have the option to pay additional customs duty, if any, in cash as well."

9. Paragraph 7.41 of the said Policy provides for the exports made under DEPB Scheme shall not be entitled for drawback. The said Paragraph 7.41 reads thus :

"7.41 The exports made under the DEPB Scheme shall not be entitled for drawback. The additional customs duty paid in cash on inputs under DEPB shall be adjusted as Modvat credit or Duty Drawback as per Rules framed by the Deptt. of Revenue."

10. It is true that under Paragraph 7.41 of the EXTM Policy, the exports made under the DEPB Scheme would not be entitled for drawback. However, the Board extended the brand rate drawback scheme in DEPB scheme vide its Circular No. 68/97 in view of the various representations received from trade/exporters. We may be benefited by the reproduction of the said circular to appreciate the controversy in proper perspective. Circular No. 68/97 reads thus :

"Circular No. 68/97-Cus., dated 2-12-1997

(From F.No. 605/145/97-DBK)

Government of India

1. Various representations have been received from Trade/Exporters that wherever final goods exported by them are not liable to Central Excise duty, in such cases, the exporters are unable to avail of Modvat credit of Additional Customs Duty (CVD) paid in cash on imported inputs, or excise duty paid on indigenous inputs, utilised in the production of export goods: and thus the duties suffered by them are not fully compensated to them at the time of export.

2. In view of the above, the issue has been examined and it has been decided that the exports made under D.E.P.B. Scheme of those products which cannot avail Modvat credit of the Additional Duty of Customs (CVD) paid in cash on imported inputs or excise duty paid on indigenous inputs since no excise duty is payable on the export goods, will be eligible for payment of Brand Rate of Drawback to be fixed by the Directorate of Drawback against Additional Customs Duty/Excise Duty suffered on inputs, on submission of proof of payment of duty.

3. Accordingly, drawback will be payable to such exporters under Rule 6(1)/7(1) of the Customs and Central Excise Duties Drawback Rules, 1995, at the rate fixed on specific application. The procedure laid down under Drawback Rules, 1995, will have to be followed for fixation of Brand Rates of Drawback. Such exporters will have to apply to the Directorate of Drawback for fixation of Brand Rates on exports under DEPB. To enable the exporters to file their application for Brand Rates, they may be permitted to file "DEPB-cum-Drawback Shipping Bill". However, under no circumstances, the exporter are allowed to claim All-Industry Rate of Drawback."

11. A perusal of the said circular would show that the representations were made to the Board by various exporters as well as the people in that trade that the duties suffered by the exporters being unable to avail Modvat credit of additional customs duty (CVD) paid in cash on imported inputs or excise duty on indigenous inputs, utilised in the production of export goods was not fully compensated to them at the time of export wherever the goods exported by them were not liable to Central Excise duty. It was in this background that the Board examined the issue and it decided that the exports made under DEPB scheme of those products which cannot avail of additional customs duty (CVD) paid in cash on imported inputs or excise duty paid on indigenous inputs since no excise duty was payable, will be eligible for payment of brand rate of drawback to be fixed by the Directorate of Drawback against additional customs duty/excise duty suffered on inputs, on submission of proof of customs duty and the procedure prescribed therein. By this circular, thus, the Board extended payment of brand rate of drawback under DEPB scheme. The principal reason for such extension as is reflected from the said circular was to compensate the exporter of the duties suffered by them who were unable to avail Modvat credit on additional excise duty (CVD) paid in cash on imported inputs or excise duty paid on indigenous

inputs. Inter alia one of the conditions precedent for benefit of the said Circular No. 68/97 was non-availing of Modvat credit. After the said Circular No. 68/97 was issued, compounded levy scheme on textile fabrics by virtue of Notification Nos. 36/98 and 41/98 both dated 10th December, 1998 was introduced and thereby the deemed Modvat credit scheme came to an end with effect from 16th December, 1998. In the backdrop of introduction of compounded levy scheme on textile fabrics, again various representations were received by the Board. The Board examined the issue afresh and decided that exports made under DEPB scheme of those products which cannot avail Modvat credit of the additional duty of customs (CVD) paid in cash on imported inputs or excise duty paid on indigenous inputs will be eligible for payment of brand rate of drawback. This was applicable to export of re-rolled steel and processed fabrics. Having considered two circulars viz. 68/97 and 39/99 and impugned Circular No. 39/2001, we are unable to accept the submission of the Senior Counsel appearing for the respondents that Circular No. 39/2001 is clarificatory in nature and the Circular, Nos. 68/97 and 39/1999 have to be read in that light. The Circular No. 39/2001 is not clarificatory but is a fresh look of the matter in the light of some doubts having arisen and the double benefits being taken by the exporters under the Circular Nos. 68/97 and 39/99. The fresh look of the matter by the Board reflected in the Circular No. 39/2001 seems to withdraw the extension of benefits given vide Circulars 68/97 and 39/99 bring the matter more in conformity with the EXIM Policy. Obviously, Circular 39/2001 cannot be said to be illegal, save and except to the extent it is sought to be given retrospective effect. Neither Circular No. 68/97 nor Circular No. 39/99 suggests that the brand rate of drawback was restricted to the indigenous inputs not mentioned in SIGN. On the other hand Circulars 68/97 and 39/99 would show that where Modvat credit was not available, brand rate of drawback was made available over and above the DEPB. Thus, the new Circular No. 39/2001, though cannot be faulted being in accord with the EXIM policy, however, in respect of the drawback claims which had been completed and drawback had been given pursuant to Circular No. 39/99, the drawback cannot now be rejected or claimed back under the Circular No. 39/2001. The exporters who had already made commitments and exported the goods acting on the Circular No. 39/99 cannot be deprived of the brand rate drawback scheme, of course - subject to fulfilment of all conditions of the Circular No. 39/99 until the Circular No. 39/2001 came into effect. What has been provided for the first time vide Circular No. 39/2001 cannot be permitted to be applied in the garb of clarification with retrospective effect from the date the Circular Nos. 68/97 and 39/99 came into effect.

12. There appears to be no doubt about the legal position that amendment in the Board's circular with retrospective effect so as to take away the right conferred on exporter is not legally permissible. One of us (J.P. Devadhar, J.) speaking for the Division Bench in *Gandhi Sons & Others* (Supra) held to that effect.

13. In *Paper Products Ltd.*, the Supreme Court ruled that the circulars issued by the Board were binding on the departmental authorities and the department

cannot repudiate the circular issued by the Board on the basis that it was inconsistent with the statutory provision. Same thing is sought to be done by the department by repudiating the Circular No. 39/99 issued by the Board though in the garb that the said circular has been issued clarifying the whole position. But the fact is that the Circular No. 39/99 is sought to be repudiated by the department indirectly because it is inconsistent with the EXIM policy.

14. In H.M. Bags Manufacturer, the Apex Court held that circular issued by the Board u/s 37B of the Central Excise Act is effective from the date of the notification or publication. We have no hesitation in holding that the Circular No. 39/2001 has to be effective from the date it was issued and published. In other words, the Circular No. 39/2001 has to be held to be prospective and cannot be made applicable with retrospective effect.

15. The judgment of the Supreme Court in A/Ion Engineering Corporation relied upon by Mr. Desai, the learned Senior Counsel for the respondents cannot be applied in the facts and circumstances of the present case. Paragraph 11 of the said report upon which strong reliance has been placed by the learned Senior Counsel reads thus :

"11. The 1971 notification did not elaborate or specify as to what would be regarded as a rigid plastic sheet. In order that there should be no ambiguity as to what is to be categorised as a flexible or rigid material the explanation was inserted in 1978. It is rightly not being contended that the Central Government could not have included the explanation at the time when the notification was first promulgated in 1971. The Central Government could at that very first instance restrict the ambit of the exemption notification to a particular variety of goods. After all, no manufacturer has a right to claim exemption. It is a relief which is granted by the Government in case where it thinks appropriate and proper. Exemptions could be granted subject to certain conditions. They may even be granted, as in this particular case, to a small variety of items, which would otherwise fall under Tariff Item 15A. If the explanation could have been inserted in 1971 when the exemption was first promulgated there is, in our opinion, no legal impediment in the Government issuing a notification which has the effect of amending an earlier notification and thereby restricting the operation of the exemption notification. Under the General Clauses Act when power is given to the Government to issue notification there is inherent in the same power to amend the same. This is precisely what has happened in the present case."

16. What is said by the Supreme Court in the aforesaid paragraph is that what could have been done by the Central Government by including explanation at the time when the notification was first promulgated in the year 1971 could always be done by inserting explanation in the year 1978. We are afraid by the said proposition, it cannot be held that circulars which are in the nature of administrative instructions issued by the Board could be made applicable with retrospective effect so as to take away the rights conferred on the exporters.

17. We, accordingly, dispose of the writ petition by following order :

(i) We hold that Circular No. 39/2001 is effective prospectively.

(ii) The orders dated 29th October, 2002 (Exhibits A to A-7) are quashed and set aside.

(iii) The Respondent No. 2 is directed to process the applications made for fixation of brand rate of drawback accordingly.

18. No costs.