

**(2000) 07 MAD CK 0076**

**In the Madras High Court**

**Case No :** Writ Petition No. 18932 of 1992 and W.M.P. No's. 27246 and 27247 of 1992

Bestnut Corporation

APPELLANT

Vs

Assistant Collr. of Cus.(DBK)

RESPONDENT

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**Date of Decision :** 24-07-2000

**Acts Referred:**

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 74, 75

Customs and Central Excise Duties (Drawback) Rules, 1971 — Rule 3, 4, 6, 7

**Citation :** (2000) 122 ELT 11

**Hon'ble Judges :** Y. Venkatachalam, J

**Bench :** Single Bench

**Advocate :** V. Ramachandran for S.K. Mani, for the Appellant; J. Madangopal Rao, Sr. Central Government Standing Counsel, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Y. Venkatachalam, J.—Invoking Article 226 of the Constitution of India, the petitioner herein has filed the present writ petition seeking for a Writ of Certiorari or other appropriate writ, direction or order calling for the third respondent in F. No. 380/3/DBK/91-RA. CUS-Order No. 1258/92, dated 13th August, 1992 and to quash the same.

2. In support of the writ petition, the petitioner herein has filed an affidavit wherein they have narrated all the facts and circumstances that forced them to file the present writ petition and requested this court to allow the writ petition as prayed for. Per contra, on behalf of the respondents a counter affidavit has been filed rebutting all the material allegations levelled against them one after the other and ultimately they have requested this court to dismiss the writ petition for want of merits.

3. Heard the arguments advanced by the learned Counsel appearing for the respective parties. I have also perused the contents of the affidavit and the

counter affidavit together with all other relevant material documents available on record in the form of typed set of papers. I have also taken into consideration the various points raised by the learned Counsel appearing for the respective parties during the course of their arguments.

4. In the above facts and circumstances of the case, the only point that arises for consideration is, as to whether there are any valid grounds to allow this writ petition or not.

5. The brief facts of the case of the petitioner as seen from the affidavit are as follows: The petitioner is a Partnership Firm carrying on the business of manufacture and marketing of tinned and pouched roasted cashew nuts, mixed nuts and peanuts. The petitioner has a factory at the SIDCO Industrial Estate, which is fully equipped for the manufacture of the aforesaid items. The roasted cashew nuts are manufactured by a sophisticated process, which requires that the products should be processed and packed in hygienic conditions, which ensure the safety, utility and the quality of the products. The petitioner has a large export market. The products manufactured by the petitioner are exported to various countries around the world, including the Far East, Europe and other countries. Since the packing of the products is of considerable importance for preserving the quality, great care has to be taken in securing appropriate packing materials. The standard packages of the petitioner consists of tins and pouches, the packing has to be done in vacuum in air tight containers which are not liable to be affected by weather conditions, moisture and other external circumstances. For this purpose, the petitioner imports packing materials, which are used in the packing of the products. The products accepted are in packed conditions, consisting of tins and pouches. The tins and pouches imported by the petitioner are liable to customs duty on their import. Consequently the petitioner pays import duty on the import of such cans and pouches. The import duty payable on the cans is at the rate of 70% plus 40% plus 20% or 70% plus 45% plus 20% or 70% plus 40% plus 15% plus 15% as the case may be. The import duty is paid by the petitioner pursuant to the Bill of Entry at the time of import of the packing materials. The packing materials are used in the export of the finished products as they are without modification. The cans are ready made except for the assembly. They contain an easy opening provision. The pouches are also in usable condition and only require to be sealed after vacuum filling. The finished products thus consist of packed roasted nuts, which comprise of the cans or pouches as the case may be and the filled in products. The products are commercially known as tinned or packed nuts. Under the provisions of the Customs Act, the petitioner is eligible for drawback of customs duty paid by it on the import of goods or materials, which are exported. Since the petitioner has paid customs duty on the import of the cans and pouches, it is eligible for drawback of Customs Duty paid by it on such import as and when they are exported. The export of the cans and pouches along with the roasted nuts thus constitute and export of the imported materials entitling the petitioner to the claim of drawback of customs duty paid by its on the import. Therefore, the

petitioner applied to the first respondent for the claim of drawback in respect of the consignments. The first respondent before whom the above claim for duty draw back was made, held that the petitioner was not eligible for the duty drawback, since according to him the examination reports of the goods do not state whether the identity of the goods exported was established with reference to the import documents. The first respondent further held that even though the identity was established with reference to import documents, the cans and pouch materials had lost the identity as original goods and assumed the role of packing materials at the time of export. According to the first respondent, for the purpose of Section 74, the goods imported should not only retain the identity as goods but also retain their character as goods. In this view of the matter, the first respondent held that the goods had lost their identity and consequently were not eligible for the benefit of duty drawback u/s 74 of the Customs Act. Aggrieved the petitioner filed an Appeal before the Collector of Customs (Appeals), Madras and challenged the validity of the order of the first respondent, declining to grant duty drawback to the petitioner. The Collector of Customs (Appeals) by his order in Appeal No. C-48/98-103 of 1989, dated 19th October, 1990 allowed the petitioner's claim for duty drawback. The Collector (Appeals) found that the petitioner is a Small Scale Industry engaged in the manufacture and export of Cashew kernels, peanuts and mixed nuts in consumer packings earning valuable Foreign Exchange through value added realization. It was further found that in order to compete with the foreign markets, with multinational, the petitioner had to import packing materials of International standard in line with the products available in the foreign markets. This necessitated the import of built up printed cans and roll-stock pouched materials. Before the Appellate Authority, the petitioner explained the process involved in the packing. The metal can with lid imported from abroad is used for packing the nuts, which are put inside and the lid sealed with vacuum sealing. There is no other process involved in respect of the cans and the entire cans imported are exported with the lid. Similarly the laminated printed roll is folded into pouches and sealed. Two sizes of rolls are imported for making two types of pouches. Detailed accounts have been maintained for the total quantity of tolls imported for pouches and these are tallied. Thus the entire imports are exported. The Collector (Appeals) accepted the contentions of the petitioner and allowed the petitioner's appeal and held that the petitioner was entitled to the claim of drawback customs duty. The said order of the Collector has become final. That being so, the petitioner received from the third respondent a Show Cause Notice in F. No. 380/3/DBK/91 RA.CUS, dated 14th March, 1991 calling upon the petitioner to explain why the Order of the Collector (Appeals) should not be set aside inter alia, on the ground that the items imported by the petitioner had lost their identity as obtaining at the time of import, whereas the imported materials were cans and pouch materials and the exported products as per description in the shipping bills were roasted, salted mixed nuts. The notice further stated that the pouching and the cans had lost their character as goods u/s 74 of the Act and hence the benefit of the Section was not available to the petitioner. The petitioner submitted their objections to

the aforesaid notice, but the objections were rejected and by order in F.No.380/3/DBK/91-RA-CUS Order No. 1258/92, dated 13th August, 1992, the third respondent confirmed the Review proposal and set aside the order in Appeal of the Collector (Appeals) and restored the order-in-original of the first respondent. According to the petitioners the order of the third respondent is wrong and opposed to law. No appeal, Revision or other remedy are provided under the Customs Act against an order in review of the third respondent. Hence this writ petition.

6. Per contra, in the counter affidavit filed by the respondents inter alia it is contended by them that as the order of the Collector of Customs (Appeals) was prima facie not correct, the Custom House filed a review application before the third respondent who set aside the order of the appellate authority and restored the order of the original authority after following the principles of natural justice. It is their case that the goods exported were identified as roasted salted mixed nuts and not as cans and pouches and as the goods, imported have lost their original character and identity, the claim u/s 74 of the Customs Act, for payment of drawback is untenable. Further according to them, the drawback rate fixed u/s 75 of the Customs Act covers Customs and Central Excise duties paid on the raw materials, components, consumables, etc., used in the manufacture of the exported product as well as the packing materials used in the packing of such export products. Therefore the provisions for payment of drawback u/s 75 of the Customs Act takes care of the duties paid on packing materials also. Further according to them, in the instant case, the proper recourse should have been to apply for brand rate of drawback for the products exported including for the packing materials used for packing the export products. As the petitioner has not applied for the same and the time limit prescribed is also barred the payment of drawback u/s 74 of the Customs Act for such re-exports and hence the claim u/s 74 is incorrect. As the petitioners have not followed the procedure for fixing Brand rate under Rule 6 or special brand rate under Rule 7 of the Drawback Rules, they could not take recourse u/s 74 of the Customs Act, 1962. Moreover the petitioner applied for fixation of brand rate under rule 6 or special brand rate under Rule 7 of the Drawback Rules and hence no drawback is payable on the packing materials imported and re-exported after using them for packing the export products and that therefore for the reasons states supra, the writ petition has to be dismissed as the same is devoid of merits.

7. Having seen the entire material available on record and from the facts and circumstances of the case and also from the claims and counter made by the rival parties, the following are the admitted facts. The petitioners herein have filed the present writ petition against the order of the 3rd respondent which rejected their claim for drawback on the packing material i.e., imported cans and pouches u/s 74 of the Customs Act, 1962. The petitioner, a partnership firm is carrying on the business of manufacture and marketing of tinned and pouched roasted cashew nuts, mixed nuts and peanuts. The petitioner exported salted mixed nuts in imported cans and pouches and claimed drawback on packing

material (imported cans and pouches) u/s 74 of the Customs Act, 1962, which was rejected by the original authority on the ground that the identity of the goods was not established as the packing materials lost their original identity. Aggrieved by the order of the original authority the petitioner herein filed an appeal before the Collector of Customs (Appeals), Madras who set aside the order of the original authority with consequential relief to the petitioner. As the order of the Collector of Customs (Appeals) was prima facie not correct, the Customs House filed a review application before the third respondent who set aside the order of the appellate authority and restored the order of the original authority after following the principles of natural justice. It is significant to note that the settlement of drawback on goods imported and re-exported as such are subject to the condition that the goods are identified as such to the satisfaction of the Asstt. Collector and subject to other conditions laid down therein. However, the goods namely, packing material viz., can and pouches in question were not imported as such as having been used for packing salted mixed nuts, the description in the shipping bills itself is, 'Roasted salted, [MISSING TEXT] salted mixed have lost their original character and identity, the claim u/s 74 of the Custom Act for payment of drawback is untenable. It is also the strong contention of the respondents that only the drawback rate fixed u/s 75 of the Customs Act covers Customs and Central Excise duties paid on the raw materials, components, consumable, etc., used in the manufacture of the exported product as well as the packing materials used in the packing of such export products. Further it is also significant to note that the General Note, 3 of the Public Notice (DBK) 3/90, dated 19.06.1990 issued under Rules 3 and 4 of the Drawback Rules very clearly states that the rate of drawback expressed against the various sub-serial numbers in the drawback schedule includes drawback payable on packing materials also, if any used and that therefore, the provision for payment of drawback u/s 75 of the Customs Act takes care of the duties paid on packing materials also. Therefore it is contended by the respondents that in the instant case, the proper recourse should have been to apply for brand rate of drawback for the product exported including for the packing materials used for packing the export products. But as the petitioner has not applied for the same and the time limit prescribed is also barred, the payment of drawback u/s 74 of the Customs Act, for such re-exports and hence the claim u/s 74 is incorrect. It is also the clear case of the respondents that a new provision incorporated under general Note 3(a) appended to the Drawback Public Notice 1/93, dated 31.05.1993 which came into operation from 01.06.1993 for payment of drawback on packing materials also, provided the export product themselves are not covered subsequently in the drawback schedule, but the packing materials themselves are covered under any sub-serial No. the drawback schedule. Such provision was not available during the period in dispute. Further it is also their contention that the petitioner applied (sic) for fixation of brand rate under Rule 6 or special brand rate under Rule 7 of the Drawback Rules, hence no drawback is payable on the packing materials imported and re-exported after using them for packing the export products. Therefore, in the above facts and circumstances of the case. I

see every force in the contentions raised by the respondents.

8. Therefore, for all the aforesaid reasons and in the facts and circumstances of the case and also in view of my above discussion with regard to the various aspects of this case, I am of the clear view that the petitioners herein have failed to make out any case in their favour and that therefore there is no need for any interference with the order impugned in this writ petition. Thus the writ petition fails and the same is liable to be dismissed for want of merits.

9. In the result, the writ petition is dismissed. No cost. Consequently WMP. Nos. 27246 and 27247 of 1992 are also dismissed.