(2010) 05 KL CK 0115

In the High Court Of Kerala

Case No : Writ Petition (C) No. 21315 of 2005

Bhandari Power Lines Pvt. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 17-05-2010

Acts Referred:
Customs Act, 1962 — Section 75, 75(1), 75(1A)
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 3, 6

Citation : (2011) 270 ELT 173

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : John Varghse, ASG, for the Respondent

Final Decision : Allowed

Judgement

S. Siri Jagan, J.—The petitioner is a manufacturer and exporter of insulated copper strips and rectangular paper covered conductors. The two raw materials which go into the manufacture of these products are insulation paper and copper. Insulation paper required for manufacture of this item is imported by the petitioner. But, copper which goes into the manufacture of those items is procured by the petitioner from local manufacturers. The petitioner is a manufacturer who is entitled to drawback u/s 75 of the Customs Act in respect of goods imported by them. The relevant portions of Section 75 of the Customs Act applicable to the case are Section 75(1) and sub-section (1A) thereof, which read thus :

75. Drawback on imported materials used in the manufacture of goods which are exported :- (1) Where it appears to the Central Government that in respect of goods of any class or description manufactured, processed or on which any operation has been carried out in India, being goods which have been entered for export and in respect of which an order permitting the clearance and loading thereof for exportation has been made u/s 51 by the proper officer or being goods entered for export by post u/s 82 and in respect of which an order

permitting clearance for exportation has been made by the proper officer, a drawback should be allowed of duties of customs chargeable under this Act on any imported materials of a class or description used in the manufacture or processing of such goods or carrying out any operation on such goods, the Central Government may, by notification in the Official Gazette, direct that drawback shall be allowed in respect of such goods in accordance with, and subject to, the rules made under sub-section (2):

Provided that no drawback shall be allowed under this sub section in respect of any of the aforesaid goods which the Central Government may, by rules made under sub-section (2), specify, if the export value of such goods or class of goods is less than the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods, or is not more than such percentage of the value of the imported materials used in the manufacture or processing of such goods or carrying out any operation on such goods or class of goods as the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provided further that where any drawback has been allowed on any goods under this sub section and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India within the time allowed under the Foreign Exchange Management Act, 1999 (42 of 1999), such drawback shall be deemed never to have been allowed and the Central Government may, by rules made under sub-section (2), specify the procedure for the recovery or adjustment of the amount of such drawback.

(1 A) Where it appears to the Central Government that the quantity of a particular material imported into India is more than the total quantity of like materials that has been used in the goods manufactured, processed or on which any operation has been carried out in India and exported outside India, then, the Central Government may, by notification in the Official Gazette, declare that so much of the material as is contained in the goods exported shall, for the purpose of sub-section (1), be deemed to be imported material.

2. In exercise of powers u/s 75(1A) of the Customs Act, the Government of India has issued Ext. P7 notification declaring that the whole of the material specified in the fable annexed as contained in the goods manufactured in India and exported outside India shall, for the purpose of sub-section (1) of Section 75, be deemed to be imported material. Item 21 of the table is copper. Therefore, by virtue of Ext. P7 notification, the petitioner claimed drawback in respect of the copper used by the petitioner in the manufacture of the exported goods, which was originally rejected by Ext. P6 order. The same was challenged by the petitioner before this Court in O.P. No. 23287/2001, in which, by Ext. P8 judgment, this Court directed the respondent to reconsider the issue in the light of Ext. P7 notification. Pursuant thereto. Ext. P9 order has been passed, the operative portion of which reads thus :

2. I have carefully gone through the records and perused the documents submitted by the exporters. The issue involved is while fixation of brand rate of duty drawback, for calculation of incidence of duty in respect of items covered under notification No. 44/1991-Cus. (N.T.), dated 30-5-1991 whether they should be treated as deemed imported material or not.

3. Section 75 of the Customs Act, 1962 deals with the drawback on imported material used in the manufacture of goods which are exported. Subsection (1) of Section 75 provides for allowing of drawback of duty of customs on imported material, subject to rules made under sub-section (2) By virtue of powers conferred u/s 75(1) of the Act ibid the Central Government made Customs and Central Excise Duties Drawback Rules, 1995. Rule 6 of the said rules provides for determination of drawback in respect of goods where no amount or rate of drawback has been determined under Rule 3 of the said rules. The said rule clearly enunciate for determination of the amount or rate of drawback considering the materials or components used in the production or manufacture of goods and the duties paid on such materials or components. The rate is determined after causing such enquiry to ascertain the actual incidence on materials or components used in the manufacture of components.

4. Section 75(1A) stipulates that the Central Government may by notification declare a particular material as deemed imported material provided the quantity of such material imported into India is more than the total quantity of like material that has been used in the goods manufactured and exported outside India. By virtue of these powers, the Central Government has notified some materials vide notification No. 44/91 dated 30-5-1991.

5. In the instant case, copper is one of the inputs used in the manufacture of paper insulated copper strips and rectangular paper covered copper strips. During the relevant period, the notification inter alia included copper. In view of this the exporters contended that for determination of drawback under Rule 6, the Ministry should treat copper used in the export products as deemed import material. It is pertinent to mention here that Section 75(1A) prescribing the deemed import material is only for the purpose of fixation of All Industry Rates of duty drawback under Rule 3 of the Customs & Central Excise Duty Drawback Rules. 1995 which are calculated on an average basis by taking into account the average quantity and value of materials used in the manufacture of export products. In the instant case, the exporters sought determination of duty drawback under Rule 6 which is commonly referred to as brand rate of duty drawback and is based on actual duty incidence suffered on materials used in the manufacture of export produces as evidenced by duty paying documents. The exporters had procured copper from domestic sources and have availed CENVAT credit of central excise duty paid on the said produce. In fact, the incidence of duty suffered on copper has already been neutralised by way of CENVAT Credit.

6. The contention of the exporters that duty incidence on copper should be computated on deemed import basis is not acceptable because the very concept

of Section 75(1A) treating the material as deemed import material is by comparing the total quantity of such material imported into India and the quantity contained in the export product utilizing the said material. In essence, it implies that materials are considered deemed imported material on an all-India basis adopting the above said criterion and notified accordingly. For the aforesaid reasons, the exporters are not entitled to the benefit under notification No. 44-91-Cus. (N.T.), dated 30-5-1992 in respect of copper used in the manufacture of exported produces for determination of brand rate under Rule 6 of the Customs & Central Excise Duties Rules.

ORDER

7. I hereby order that the exporters are not entitled to duty drawback on copper in terms of notification No. 44-91-Cus. (N.T.), dated 30-5-1991 in respect of three brand rate applications for which rates have been determined vide Ministry''s F.No. 601 /8401/484/2001-DBK (Kochi-09) dated 21-3-2002, F.No. 601/8501/485/2001-DBK (Cochin-08) dated 19-3-2002 and F.No. 601/8501/486/2001-DBK (Cochin-07) dated 19-3-2002.

3. The petitioner contends that Ext. P9 wrongly proceeds on the basis that drawback on the basis of notification issued by the Government u/s 75(1A) is applicable only to exporters who apply for drawback as per "All Industry Rate" fixed by the Government and not to exporters who apply for drawback as per "Brand Rate" to be fixed. The petitioner''s contention is that this finding is ex facie illegal since neither sub-section (1A) nor Ext. P7 notification either expressly or impliedly stipulates that the drawback as declared in respect of sub-section (1A) is available only for those exporters who apply for drawback at "All Industry Rates" and not to those exporters who apply at "Brand Rates."

4. A counter affidavit has been filed by the respondents reiterating the findings in Ext. P9 order.

5. I have heard counsel on both sides.

6. As is clear from the facts narrated above, the only question which requires to be considered in this case is as to whether a notification Issued under sub-section (1A) of Section 75 is restricted to exporters who apply for drawback as per "Ail Industry Rates" and as to whether the same applies to exporters who apply for drawback at "Brand Rate" also. As is clear from Section 75 of the Customs Act and Ext. P7 notification, the same do not either expressly or impliedly stipulate that drawback claimed in respect of the goods notified under subsection (1A) to Section 75 is restricted to exporters who apply for drawback at "All Industry Rates." Such a conclusion is not warranted by the language of Section 75 also. That being so, the respondents could not have arbitrarily assumed that drawback in respect of the goods declared by the Government under subsection (1A) of Section 75 is restricted to exporters who apply for drawback at "All Industry Rates." As such, I am of opinion that the question of application of "All Industry Rates" and "Brand Rates" are applicable only for the

determination of the actual amount of drawback to be granted to exporters and not for deciding as to whether any exporter is eligible for any drawback at all. Therefore, clearly, Ext. P9 order is unsustainable under law.

7. Accordingly, Ext. P9 is quashed. It is declared that the petitioner though applied for drawback at "Brand Rate" is eligible for drawback on the copper used by them in the manufacture of the imported goods in view of Ext. P7 notification in which copper has been declared as deemed imported material u/s 75(1A) of the Customs Act. Consequently, the petitioner is entitled to claim drawback in respect of the amount of copper used in the manufacture of the goods exported by them. Therefore, the respondents are directed to calculate the amount of drawback available to the petitioner in respect of the goods exported by the petitioner which is the subject matter of Ext. P9 order and disburse the amount due to the petitioner as drawback at the rate applicable as expeditiously as possible, at any rate, within three months from the date of receipt of a copy of this judgment.

8. The writ petition is allowed as above.

