

(2012) 07 GUJ CK 0043

In the Gujarat High Court

Case No : Special Civil Application No. 8437 of 2006

Choice Laboratories and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 18-07-2012

Acts Referred:

Customs Act, 1962 — Section 75

Citation : (2013) 289 ELT 287 : (2013) 19 GSTR 539

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Amee Yajnik, for the Respondent

Judgement

Akil Kureshi, J.—The petitioners have challenged the order dated September 21, 2005 (annexure I), order dated May 24, 2004 (annexure H) and order dated October 18, 2002 (annexure F) passed by the customs authorities and the Government of India. The petition arises in the following factual background. Petitioner No. 1 is a partnership-firm and petitioner No. 2 is one of its partners. The petitioners are engaged in the manufacture and export of talcum powder. They exported different consignments of such powder during the period between December, 2001 to May, 2002. The talcum powder that the petitioners exported was packed in small containers. The petitioners did not claim any duty drawback on the talcum powder itself, but claimed duty drawback on the packing material. Such claims were accepted by the customs authorities with respect to six different exports made between December, 2001 to February 18, 2002 and duty drawback disbursements were also made. However, in relation to four subsequent exports made between April, 2002 to June, 2002, such claims were not accepted, no disbursement was made. The details of various claims and its position with respect to disbursement or otherwise are as follows:

2. The respondents believing that the petitioners were not entitled to any duty drawback, issued a show-cause notice dated August 13, 2002 calling upon the petitioners to explain why the claims which were pending should not be rejected

and the drawback amount which was already sanctioned and disbursed, should not be recovered. In the show-cause notice, the Deputy Commissioner stated as under:

3. As per clarification made in the General Notes on Drawback Schedule 2001-02, the drawback on packing material is inclusive in the product itself. As such the drawback claim on packing material appears to be inadmissible and becomes recoverable.

3. The petitioners replied to such show-cause notice under their communication dated September 10, 2002. In such reply, the petitioners contended that they had not availed of duty drawback on talcum powder at all. They had availed of duty drawback only on packing material which was made of HDPE bottles in which the talcum powder was packed. Such drawback was available under the Drawback Schedule Entry No. 39.07.

4. The adjudicating authority, however, rejected the petitioners' objections by an order-in-original passed on October 18, 2002. He held that the petitioners were not entitled to any drawback. He concluded that, "The party has exported talcum powder classifying under Chapter 33. As per classification made in the General Notes on Drawback Schedule, 2001-02, the drawback on packing material is inclusive in the product itself. There is no all industry rate of drawback admissible on talcum powder classified under Chapter 33 of the Tariff. Hence, claim of the party for packing material under a separate heading is not admissible.". He, accordingly, directed recovery of the drawback claims already sanctioned and disbursed. He also rejected the remaining claims which were pending with the Department.

5. Aggrieved by the order passed by the adjudicating authority, the petitioners preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals) rejected the appeal observing that the petitioners had exported the talcum powder packed in HDPE bottles. The petitioners had, however, claimed the drawback on HDPE bottles. The component of duty drawback on packing material is in-built in the main product and that, therefore, the petitioners should have claimed the drawback on the talcum powder. He relied on General Note No. 4 issued under Notification No. 29/ 2001-Customs (N.T.), which provides that the rates of drawback specified against various items are inclusive of drawback for packing material used. He, therefore, concluded that, "Drawback is admissible to the product exported, i.e., talcum powder, which may be packed in any manner and the drawback rates are inclusive of packaging material. If the appellant wanted to claim drawback on HDPE bottles, they were required to export the empty bottles which is not the case over here. Further, the appellant claim of the drawback on HDPE bottles, which constitute almost 75 per cent of the value, vis-a-vis, the value of talcum powder, defy logic. If, for a moment, it is assumed that the appellant had exported talcum powder in the gilt-packed bottles, would it entitle them to claim the drawback on the golden bottles. The answer would be an emphatic No. Accordingly, the denial of drawback is in order.".

6. The petitioners carried the matter further in appeal before the Government of India under revision. The revisional authority dismissed the petition holding as under:

7.3 The Government further notes that rule 3(1) of the Customs and Central Excise Duties Drawback Rules clearly prescribed that if the said goods except tea chests used as packing material for export of blended tea have been taken use after manufacture, no drawback shall be allowed. In the instant case, the packing materials on which the applicants have claimed drawback have been used for packing the goods exported, i.e., HDPE bottles. The applicants could have claimed drawback of duties on packing materials under serial No. 39.07 of All Industry Rate in case the packing materials was exported as such, i.e., without using for packing of the export goods.

7. The petitioners have, therefore, approached this court challenging the above mentioned orders passed by the respondents.

8. The counsel for the petitioners took us to the Central Excise and Customs Duties Drawback Rules, 1995 ("the Drawback Rules" for short) and other relevant literature on the issue to contend that the claim of the petitioners for drawback on the packing material was fully justified. The authorities erred in rejecting such a claim.

9. The counsel submitted that the packing of talcum powder was an integral part of the manufacturing process and that, therefore, the petitioners could legitimately claim drawback on the packing material. He submitted that the exclusion of value of packing material would not apply in the present case.

10. The counsel pointed out that, had the petitioners exported empty bottles, drawback on such product would have been readily granted by the Department. In the present case, the petitioners could also have applied for fixation of drawback rates for talcum powder and in which case, the Department would have also fixed appropriate rates taking into account the value of packing material also.

11. The counsel submitted that initial six claims were accepted and the amounts of drawback were disbursed. The petitioners as exporters would, thus, fix the sale price of the product accordingly taking into account the drawback component. He, therefore, submitted that it would be harsh to now seek recovery of the claims already passed.

12. On the other hand, learned counsel Ms. Amee Yajnik for the Department opposed the petition. Relying on the affidavit-in-reply filed by the respondents, she contended that the petitioners exported talcum powder. Since the rate of duty drawback was not fixed for such a product, in the absence of the petitioners applying for fixation of such rates, no drawback could be separately claimed merely on the packing material.

13. As is well known, the Duty Drawback Scheme is formulated in exercise of

powers conferred u/s 75 of the Customs Act, 1962. At the relevant time, such entitlements were governed by the Drawback Rules. Rule 2(a) of the Drawback Rules defines the term "drawback". Rule 2(e) of the Drawback Rules defines the term "manufacture" as including processing of or any other operation carried out on goods, and the term "manufacturer" to be construed accordingly.

14. Rule 3 of the Drawback Rules, which is of considerable importance for us, pertains to drawback. Relevant portion thereof reads 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 Excises and Salt 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 thereunder, or of the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty paid or the rebate, refund or credit obtained:

Provided further that no drawback shall be allowed--

(i) if the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture;

(ii) if the said goods are produced or manufactured, using imported materials or excisable materials in respect of which duties have not been paid; or

(iii) on jute batching oil used in the manufacture of export goods, namely, jute (including Bimlipatam jute or mesta fibre), yarn, twist, twine, thread, cords and ropes;

(iv) if the said goods, being packing materials have been used in or in relation to the export of--

(1) jute yarn (including Bimlipatam jute or mesta fibre), yarn, twist, twine, thread, cords and ropes in which jute yarn predominates in weight;

(2) jute fabrics (including Bimlipatam jute or mesta fibre), in which jute predominates in weight;

(3) jute manufactures not elsewhere specified (including Bimlipatam jute or mesta fibre), in which jute predominates in weight.

15. Rule 6 provides that where amount or rate of drawback has not been determined in respect of any goods, any manufacturer or exporter of such goods may, within specified time, apply to the Central Government for determination of amount or rate of drawback giving relevant facts.

16. The Government of India issued Notification No. 29/2001, dated June 1, 2001 providing general notes for drawback rates for the year 2001-02. Note No. 3 thereof reiterated that where the export product is not specifically covered by the description of goods in the table attached to the Notes, the rate of drawback may be fixed, on an application by an individual manufacturer/exporter in accordance with the Drawback Rules.

17. Note 4 of the said notes provides that the rates of drawback specified against various serial/sub-serial numbers in the table in specific terms or on ad valorem basis, unless otherwise specifically provided, are inclusive of drawback for packing materials used, if any.

18. Paragraph 11 of the Notes provides for the drawback on composite article for which no specific rates have been provided in the table and reads as under:

11. Whenever a composite article is exported for which any specific rate has not been provided in the table, and if contents of its various constituent materials, viz., iron, glass, copper, zinc, brass, etc., are visibly distinguishable and their weight unambiguously verifiable, the drawback rates applicable to such materials can be extended to the composite article according to net content of such materials

19. It is not in dispute that for talcum powder, no rate for claiming drawback was prescribed in the table to the said notification. It is also not in dispute that for articles made of high density polyethylene, appropriate rates of drawback in case where Cenvat facility was not availed of and when Cenvat facility was availed, were provided. In the case of the former, the rate of drawback was Rs. 18 per kilogram and in the case of the latter, such rate was of Rs. 8.50 per kilogram.

20. In so far as the interpretation of the respondents is concerned, we are unable to find any lacuna. Undisputedly, the petitioners exported talcum powder and not the packing material. Without doubt, on such talcum powder, no rate of drawback was specified. The petitioners did not apply for fixation of any such rate. Seen in the isolation therefore, the petitioners could not have claimed any drawback on the export of talcum powder and the packing material used in the process. Rule 3 of the Drawback Rules provides for allowing drawback on the export of goods at such amount or at such rates as may be determined by the Central Government. Thus, drawback is available on export of goods. In the present case, the goods that the petitioners exported was talcum powder. On such powder, no rates of drawback were fixed. However, the situation is somewhat complex in the present case. Firstly, it is not even the case of the respondents that had the petitioners exported only the bottles, i.e., the packing material, the petitioners would not have received drawback at the rates specified in the table

to the notification specifying appropriate rate of drawback for articles made of high density polyethylene. Even the Department initially did not object to the petitioners' claiming the drawback on such items and in fact, not only processed, accepted but even disbursed the drawback in their favour. On as many as six claims made on six different export consignments, such drawback was approved and disbursed. It was only later on that the Department asserted its present stand and withheld four further drawback claims.

21. The Departmental authorities may have been influenced by paragraph 11 of the notification dated June 1, 2001 while clearing the petitioners' initial drawback claims. The said paragraph, as noted above, permits the manufacturer/exporter to claim the drawback on individual items upon export of the composite article for which no specific rate has been provided in the table. We are, of course, of the opinion that in the present case, the petitioners cannot be stated to have exported a composite article. What the petitioners exported was the talcum powder simpliciter, of course in packed condition.

22. It is equally undisputed that, had the petitioners applied for fixation of appropriate rates for duty drawback for talcum powder, the Government authorities would have undertaken the exercise for fixation of such rates and in the process, would also have taken into account the value of the packing material. We say so because, as per sub-rule (2) of rule 3 of the Drawback Rules, such component is also to be taken into account while fixing the drawback rates. Further, under clause (iv) of the proviso to sub-rule (1) of rule 3 of the Drawback Rules, the exclusion of packing material is provided only in three categories of cases pertaining to jute yarn, jute fabrics, etc. mentioned therein.

23. The combined effect of the above peculiar facts of the case would be that had the petitioners been informed at least at the relevant time that on the packing material used in export of talcum powder, no duty drawback would be available in the absence of fixation of appropriate rate, surely the petitioners would have availed of the opportunity of having such rates fixed by the Government in terms of rule 6 of the Drawback Rules and paragraph 3 of the notification dated June 1, 2001. It was perhaps because the customs authorities accepted the petitioners' drawback claims and even disbursed such claims that the petitioners did not separately apply for fixation of drawback rates for the export of talcum powder. As noted earlier, two additional facts that need to be borne in mind are that, had the petitioners exported only the empty bottles without talcum powder, even the Government authorities agree that they would have been entitled to receive the drawback, and that the petitioners on account of claims being disbursed by the Government authorities, would have arranged their affairs financially accordingly and negotiated the terms and rates with the foreign importer on such basis.

24. Purely in the peculiar facts of the present case, therefore, we are inclined to hold that in so far as the drawback claims which were already sanctioned and disbursed previously, direction for recovering the same would be highly inequitable, unjust and therefore, should be quashed. In so far as the claims

which are not yet passed, but a show-cause notice was issued for withholding such claims, the same parameters cannot be applied since from that point onwards, the petitioners could have availed of the opportunities of having the drawback rates fixed if they desired to take the benefit. In the result, the impugned order dated September 21, 2005 (annexure I), order dated May 24, 2004 (annexure H) and order dated October 18, 2002 (annexure F) passed by the customs authorities and the Government of India are quashed in part. In so far as the authorities directed recovery of the six drawback claims already sanctioned and disbursed, reference of which is given in paragraph 25 hereinabove, the impugned orders are quashed. The rest of the orders remain unaltered. The respondents shall work out the petitioners' liability as per this judgment and regulate the deposits that the petitioners may have made before the courts or before the Department during the pendency of this proceeding and thereafter, either grant refund or raise further demand, as the situation requires. Rule is made absolute to the above extent, with no order as to costs.