

(2004) 06 GUJ CK 0020

In the Gujarat High Court

Case No : Special Civil Application No. 5604 of 1984

Jay Chemical Industries

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 17-06-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 130(2)

Citation : (2004) 24 GLH 794 : (2005) 1 GLR 86

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : R.C. Jani, for the Appellant; D.N. Raval, Senior Standing Counsel for Resp. No. 1, for the Respondent

Judgement

M.S. Shah, J.—This petition under Article 226 of the Constitution challenges the order dated 5.3.1982 passed by the Assistant Collector of Customs, Drawback Department, Bombay, respondent No. 3 herein, rejecting the petitioner's claim for drawback of customs duty and also the communication dated 31.8.1984 from the Collector of Customs, Bombay, respondent No. 2 herein, rejecting the petitioner's application for review u/s 130(2) of the Customs Act, 1962 as not maintainable.

2. The short facts giving rise to this petition, as averred by the petitioner, are as under: -

2.1 The petitioner is a small scale industrial unit manufacturing and exporting dyestuff. In the year 1981, the petitioner engaged the services of Clearing House Agent M/s Eastern Shipping Agency, Bombay and sent them the export documents for export consignment of 40 drums of dyestuff for export to Hong Kong. The contract was in US Dollar on CIF value basis. The clearing house agent prepared shipping bills and declared the CIF value as per the contract which worked out in Indian currency at Rs. 2.07,039/-. Since the duty drawback i.e. the refund of customs duty paid on the inputs utilized for manufacturing the final

product is granted on the FOB value, the amounts of freight and insurance were to be deducted from the CIF value as stated in the contract. When the petitioner presented the shipping bill to the clearing house agent on 3.7.1981, the petitioner did not have the documents showing the exact amounts of insurance and freight as those documents were sent to the petitioner by the shipping line only after the consignment left the port. The clearing house agent, therefore, declared the amount of freight and insurance on ad-hoc basis at Rs. 3,859/-, deducted the same from the CIF value and arrived at the FOB value at Rs. 2,03,200/and claimed drawback at 15% of the FOB value.

2.2 Thereafter, the petitioner received the Bill of Lading dated 13.7.1981 indicating the amount of freight of Rs. 3707.95 and the insurance paper indicating premium of Rs. 2085/-. After receiving the said documents, the petitioner sent the documents to the clearing house agent for deduction of actual amounts of freight and insurance from the CIF value to arrive at the correct value of FOB for the drawback purposes. After receiving those documents, the Assistant Collector of Customs (Drawback), respondent No. 3 herein, issued show cause notice dated 26.9.1981 (Annexure "A1") stating that the FOB value stated in the shipping bill dated 4.7.1981 was inflated to the extent of Rs. 1954.15 involving excess payment of drawback to the tune of Rs. 293.10 and, therefore, the Assistant Collector called upon the petitioner to show cause why the petitioner's drawback claim should not be rejected and action should not be taken u/s 117 of the Act. According to the petitioner, it sent the show cause notice/memo to its clearing house agent who did not take any action and, therefore, the Assistant Collector passed order dated 5.3.1982 (Annexure "C") rejecting the duty drawback claim as inadmissible/unsubstantiated only on the ground that the petitioner had not replied to the show cause memo.

2.3 The petitioner forwarded the said order to its clearing house agent for taking necessary action. Since no action appeared to have been taken by the clearing house agent and since the period of limitation had expired, the petitioner filed an application before the Collector of Customs, Bombay u/s 130(2) for review of the order of the Assistant Collector. The said application was filed on 9.7.1982. The Collector of Customs rejected the said application by his order dated 4.3.1983 (Annexure "E") on the ground that legal remedy available to the petitioner was to file an appeal before the Appellate Collector which in fact was done by the petitioner and that further remedy of the petitioner was to file an appeal before the CEGAT.

It appears that the petitioner's clearing house agent had in the meantime already filed an appeal before the Collector (Appeals), but on the ground that the clearing house agent had not produced the letter of authority from the petitioner, the clearing house agent withdrew the appeal as per its letter dated 4.9.1982 at Annexure "D1" to the petition.

The petition challenges the aforesaid orders dated 5.3.1982 and 4.3.1983.

17.6.2004

3. Mr Jani, learned counsel for the petitioner has submitted that in view of the facts stated in the show cause notice itself, even in absence of any reply from the petitioner, the Assistant Collector ought to have appreciated that there was a difference of only Rs. 1954-15 ps. between the amount of freight/insurance as declared on 4.7.1981 and the actual amount of freight and insurance as mentioned in the documents (bill of lading and the insurance Company's letter) which had become available to the petitioner subsequently after filing of the shipping bill by the petitioner's clearing house agent on 4.7.1981 and the show cause notice itself mentioned that on account of the said inaccuracy the excess claim of drawback was only to the tune of Rs. 293/- as against Rs. 30,000/- and odd amount which the petitioner was entitled to get even as per the final value declared after receiving the documents.

Reference is also made to the order dated 30.11.1981 (Annexure I/1) in another case of this very petitioner where the difference between the freight amount of Rs. 3000/- as stated in the shipping bill was found to be less than the actual freight of Rs. 9212-54ps. as mentioned in the bank certificate produced by the party and the FOB value was thus found to be inflated to the extent of Rs. 6212-54ps. resulting into excess payment of duty drawback to the tune of Rs. 900/-. A show cause memo was issued to the petitioner on 24.9.1981 but no reply was sent nor any personal hearing was asked for. The same authority, that is the Assistant Collector of Customs, Drawback Department, Bombay passed the order-in-original dated 30.11.1981 (Annexure "I/1") only imposing a personal penalty of Rs. 1000/-.

Reliance is also placed on Bombay Customs House Public Notice No. 16 dated 25.2.1980 (Annexure "I/2") stating that the authorities had been observing that in cases where invoice is expressed in terms of CIF or C & F value, the FOB value declared by the exporters on the shipping bill is generally found to be higher than what it would be after correct freight and insurance as ascertained from the concerned persons are deducted. Hence the exporters /clearing house agents and other concerned were advised that they should indicate the correct FOB value on the shipping bill by deducting actual freight and insurance rates payable and that if this is not done their claims are liable to be settled by deducting an amount in lieu of actual freight and insurance as can best be determined by the Customs House.

It is further submitted that in light of the above public notice also, the Assistant Collector ought not to have rejected the entire duty drawback claim of the petitioner but should have only deducted the amount in lieu of actual freight and insurance i.e. freight amount of Rs. 3707-95 ps. and insurance amount of Rs. 2085-20 ps. aggregating to Rs. 5793-15ps. and only the said amount should have been deducted from the CIF value of Rs. 2,07,039/- instead of rejecting the entire claim for duty drawback.

4. On merits of the first contention, Ms D.N. Raval, learned Senior Standing Counsel for the respondents has submitted that since the petitioner had not filed any reply to the show cause notice, the Assistant Collector was justified in rejecting the entire duty claim for duty drawback and also in view of the admitted mis-declaration about the amount of freight and insurance.

5. Mr Jani has also sought to make submissions for challenging the order of Collector of Customs rejecting the application for review. However, we do not consider it necessary to go into the merits of the controversy about maintainability of the review application filed by the petitioner under sub-section (2) of Section 130 of the Customs Act because the petition deserves to be allowed with reference to the first contention itself.

6. Having heard the learned counsel for the parties, we are of the view that while there was inaccuracy or discrepancy between the value of the freight and insurance declared by the petitioner's clearing house agent on 4.7.1981 and the freight and insurance actually paid by the petitioner to the extent of Rs. 1954-15ps., the Assistant Collector ought not to have overlooked the documents produced by the petitioner itself through its clearing house agent showing that the bill of lading indicating freight of Rs. 3707-95ps. was dated 13.7.1981 and, therefore, the petitioner could not have been expected to be aware of the exact amount of freight on 4.7.1981 when the shipping bill was filed by the clearing house agent on behalf of the petitioner. What we are trying to emphasize is not that the petitioner should not suffer any inconvenience or any loss or penalty on account of the discrepancy between the amounts mentioned in the declaration and the amounts actually paid by the petitioner but the Assistant Collector ought not to have rejected the entire claim for duty drawback firstly in view of the Bombay Customs House public notice No. 16 dated 25.2.1980 at Annexure "I/2", the knowledge of which must be attributed to the Assistant Collector and, secondly because the inaccuracy was not of such magnitude that the entire duty drawback claim could be rejected. The FOB value of the consignment in question was initially declared to be Rs. 2,03,200/- and on the basis of the documents supplied by the petitioner itself within ten days, the FOB value of the consignment was found to be Rs. 2,01,245/-, on the basis of which the petitioner would have been entitled to get duty drawback at the rate of 15% i.e. Rs. 30,190/- approximately. On the basis of the declaration filed by the petitioner's clearing house agent on 4.7.1981 without complete documents, the duty drawback amount would have worked out to Rs. 30,480/= that is difference of only Rs. 293/- which was slightly less than 1% of the total duty drawback amount claimable. Even if the principle of de minimus were not to be applied, at least the principle of proportionality ought to have been applied by the Assistant Collector before taking any final decision on the show cause notice in question.

7. At the cost of repetition, we would state that it is because the discrepancy was to the extent of only 1% of the total claim amount and the exact amount of freight was mentioned in the bill of lading which was issued on 13.7.1981, the

petitioner could not have been said to have made deliberate mis-statement on 4.7.1981.

8. In view of the above discussion, the matter is remanded to the Assistant Collector of Customs, Drawback Department, Bombay with a direction to consider the petitioner's claim for duty drawback on the basis of all the documents supplied by the petitioner in July, 1981 and in light of the contents of the Bombay Customs House Public Notice No. 16 dated 25.2.1980 (Annexure "I/2") to the petition and in light of the observations made in this judgment and in accordance with law and the Assistant Collector, respondent No. 3 herein, shall take decision as aforesaid within two months from the date of receipt of the writ of this Court or a certified copy of this order, whichever is earlier. In case the petitioner is required to produce any further material or documents in support of its claim, the Assistant Collector shall, within one month from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier, call upon the petitioner to do so.

9. The petition is accordingly partly allowed. Rule is made absolute to the aforesaid extent. Direct service is permitted.