(1998) 07 MAD CK 0037

In the Madras High Court

Case No : Writ Petition No. 8884 of 1998 in W.M.P. No. 13542 of 1998

J.G. Exports APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 20-07-1998

Acts Referred:
Central Excises and Salt Act, 1944 — Section 37B

Citation : (1999) 105 ELT 258

Hon'ble Judges : S.S. Subramani, J

Bench : Single Bench

Advocate : P. Jayaraman for S. Murugappan and G. Govindarajan, for the Appellant; S. Gomathinayagam, A.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

S.S. Subramani, J.—Petitioner seeks issuance of writ of mandamus directing the second and the third respondents to complete the

verification of the following Duty Entitlement Pass Book (hereinafter referred to as DEPB) licences : (i) 04600645, dated 4-6-1998; (ii)

04600567, dated 19-5-1998; (iii) 04600569, dated 20-5-1998 and (iv) 04600571, dated 21-4-1998 issued by the fourth respondent strictly in

accordance with the provisions of paragraph 7.43 of the Hand Book of procedures issued by the Ministry of Commerce and permit the petitioner-

firm to use the credits granted in terms of the said licences.

2. Petitioner is a firm engaged in business of exports of various commodities. The Government of India through the Ministry of Commerce has

formulated a scheme called Duty Entitlement Pass Book Scheme (DEPB Scheme), which is decided in Chapter 7 para 7.25 of the Export-Import

Policy for the period 1997-2002 announced by the Ministry of Commerce, Government of India.

3. As per the said scheme, on export of specified goods, the exporter will be eligible to claim a credit at a specified percentage of Free on Board

(FOB) value of exports. The rate at which the credit can be availed and the items against export of which such credit are permitted are specified

by the Director General of Foreign Trade, Ministry of Commerce, from time to time. The credits taken on the basis of the said export can be

utilised for payment of Import Customs Duty on the import of any items except those covered in the negative list of Imports as specified in the

Export-Import Policy.

4. As per the procedure of export of goods relevant shipping bills passed by the Customs Authorities are to be submitted to the licensing

authorities along with the application of DEPB licence and credit based on the application submitted from the licensing authority will issue DEPB

licences indicating the credits granted and the details of the relevant shipping bills based on which such credits are granted.

5. The Customs Authorities before allowing imports against the credits granted by the licensing authorities shall verify the details of the Exports as

given on the DEPB licences as per their records.

6. Suitable instructions have been given by the Central Board of Excise and Customs, New Delhi to the Field Customs Authorities from time to

time. These circulars relate to the procedure to be adopted, the verification of the values declared and the need for permitting exports and carrying

out the verification without delay.

7. It is stated that Circulars bearing Nos. 10/97, dated 17-4-1997; 15/97, dated 3-6-1997; 69/97, dated 8-12-1997 are issued by the Ministry of

Finance, Department of Revenue. It is also stated that since the granting of credits is as a percentage of the export value, to check the correctness

of the export value declared in the shipping bills. The concept known as present market value has been described in the Export-Import Policy.

8. Paragraph 7.36 of the Hand Book of Procedure 1997-2002 provided that in respect of products where the rate of credit against such export

products is 15% or more, the credit given should not exceed 50% of the present market value of the export products.

9. It is the case of the petitioner that in terms of Circular No. 15/97, dated

3-6-1997 the Ministry of Finance for the purpose of percentage of

credit, stated that the present market value should be verified by the proper officer of the Customs and at the time of examination of the goods, if

the FOB price declared appears to be high, there is a provision to clear such shipping bills with endorsement ''provisionally cleared for exports''. In

such cases, the designated authority of the Ministry of Commerce will not be accepting the value declared for the purpose of giving credit.

Subsequently, another circular was issued in No. 69/97, dated 8-12-1997 wherein the above instructions were modified. It was stipulated therein

that FOB value declared appears to be high and a show cause notice has to be issued indicating the reasons for reducing the FOB value. It was

further provided in the above instructions that in any case, such proceedings and enquires should be completed within 30 days from the date of

export and the same is reiterated by stating that in all cases where proceedings are not initiated within 30 days from the date of export, the value

declared must be deemed to have been accepted.

10. In this case, under four shipping bills dated 23-2-1998, 20-3-1998, 4-4-1998 and 15-4-1998 goods were exported and the value of which is

also stated therein. At the time of export, the documents were also submitted and scrutinised by the proper officer of Customs and the goods were

all examined and export was also permitted. After completion of exports, entire foreign exchange was also realised. Thereafter, the petitioner

applied to the Ministry of Commerce and based on the documents submitted, Joint Director General of Foreign Trade, Channai issued the

following DEPB licences on 4-6-1998,19-5-1998, 20-5-1998 and 21-5-1998 which has already been stated while extracting the prayer of the

writ petition.

11. It is stated that after obtaining DEPB licence, the petitioner submitted the same to the third respondent for verification as per the provisions of

paragraph 7.43 of the Hand Book of Procedure and the petitioner request for early completion of verification. Inspite of several requests, there

was no response from respondents 2 and 3.

12. On further enquiry the petitioner came to know that respondents 2 and 3 wanted to verity the correctness of the FOB value declared in

respect of subject exports and make detailed enquiries. On coming to know about the proposed verification, the petitioner explained that the

documents were already scrutinised and the goods were also examined at the time of export and only after duly passing the export consignment,

the Joint Director of Foreign Trade has issued the licence. Petitioner therefore, requested respondents 2 and 3 to honour DEPB licence without

any further delay. It is under these circumstances, the petitioner has come to this Court with the writ petition.

13. In the various grounds taken, it is stated that there is no scope for enquiry in such cases where, admittedly, the export was made long before

and no show cause notice has been issued as contemplated in Circular No. 69/97, dated 8-12-1997, since no action has been taken within 30

days from the date of export, the value declared by the petitioner shall be deemed to have been accepted. It is also submitted that after fully

verifying the correctness of exports and its value, the Joint Director of Foreign Trade has issued DEPB licence. The fact of amendment in Circulars

No. 15/97 and 69/97 were also high-lighted in the various grounds. It is further stated that the Department is bound by instructions issued by

Ministry or Board and the authorities cannot go beyond those circulars.

14. A detailed counter affidavit has been filed by the respondents wherein they justified the proposed action. According to them the FOB value is

an exaggerated value and the same was the result of overvaluation so that the exporter can claim the benefit of duty credit under the DEPB scheme

far in excess of the entitlement. It is stated that the value of the goods will be far below i.e., between 7.00 lakh to 11.00 lakh whereas a sum of Rs.

82,71,679/- for foreign exchange has been brought into the country by way of realisation of the export products. According to the respondents, it

is an exaggerated value, it is also stated that investigation was initiated at the time of export itself and the same could not be completed owing to

complex nature of export product viz., Software as it requires an intricate study and also owing to non-cooperating nature of the petitioner in not

producing the required documents of procurement and manufacture and not appearing before the department officials to answer queries with

regard to the same. They prayed for additional time to complete enquiries. It is also submitted that the department has received intelligence report

to the effect that CD-ROMS exported under DEPB Scheme have been grossly overvalued and there is likely to be incidents of illegal transactions

in Foreign Exchange in violation of law in force in this country. The respondent therefore prayed that the writ petition could be dismissed as not

maintainable.

15. After having heard the Counsel on both sides, I feel that on the basis of the Circulars issued by the Ministry of Finance, Government of India,

the petitioner is entitled to succeed. The petitioner produced documents to show that the details of the export, the FOB value, the date of

realisation of the sale proceeds etc. From the same it is clear that the same was exported on 20-3-1998, 28-2-1998, 4-4-1998 and 15-4-1998.

The particulars of the above facts could be seen with the bank certificate of export and realisation issued to the petitioner in regard to the exports in

question. It is also seen that the proceeds was also realised on 31-3-1998,21-4-1998 and 4-5-1998. The FOB value as declared by the

petitioner is also accepted by the authorities without demur. The petitioner also produced documents to show the dates on which it was actually

exported. The dates are 28-2-1998, 20-3-1998,4-4-1998 and 15-4-1998.

16. It is clear from the counter affidavit that so far no action has been taken against the petitioner declaring that the value is high. As per Circular

No. 69/97, dated 8-12-1997 it has been declared that in all cases where show cause notice challenging the declared present Market value is

issued within 30 days from the date of export, the present market value declared shall be deemed to have been accepted. In view of the deeming

provision, the value declared by the petitioner must be taken as accepted by the department.

17. The department cannot say that in respect of circulars they are entitled to hold a further enquiry. They are bound by circulars, especially in view

of the decision reported in Collector of Central Excise, Patna Vs. Usha Martin Industries, etc., of the Hon''ble Supreme Court (Collector of

Central Excise, Patna v. Usha Martin Industries) wherein their Lordships considered what is the effect of the circulars issued by the department,

how far the same binds the Court and how far the same is binding on the department. The relevant portion in paragraphs 19 to 22 reads thus :

19. ""No doubt the Court has to interpret Statutory provisions and notifications thereunder as they are with emphasis to the intention of the

legislature. But when the Board made all others to understand a notification in a particular manner and when the latter have acted accordingly, is it

open to the Revenue to turn against such persons on a premise contrary to such instructions?

20. Section 37B of the Act enjoins on the Board a duty to issue such instructions and directions to the excise officers as the Board considers

necessary or expedient ""for the purpose of uniformity in the classification of excisable goods or with respect to levy of duty excised on such

goods."" It is true that Section 37B was inserted in the Act only in December, 1985 but that fact cannot whittle down the binding effect of the

circulars or instructions issued by the Board earlier. Such instructions were not issued earlier for fancy or as rituals. Even the pre-amendment

circulars were issued for the same purpose of achieving uniformity in imposing excise duty on excisable goods. So, the circular, whether issued

before December, 1985 or thereafter should have the same binding effect on the department.

21. Through a catena of decisions this Court has pronounced that Revenue cannot be permitted to take a stand contrary to the instructions issued

by the Board. It is a different matter than an assessee can contest the validity or legality of a departmental instruction. But that right cannot be

conceded to the department, more so when others have acted according to such instructions, vide Collector of Central Excise, Bombay Vs. Jayant

Dalal Private Ltd., , M/s. Ranadey Micronutrients etc. Vs. Collector of Central Excise, , M/s. Poulose and Mathen Vs. Collector of Central Excise

and another, , British Machinery Supplies Co. Vs. Union of India (UOI) and Others, . Of course the appellate authority is also no bound by the

interpretation given by the Board but the assessing officer cannot take a view contrary to the Board''s interpretation.

22. We may observe particularly that a special aspect highlighted by the Bench in M/s. Poulose and Mathen Vs. Collector of Central Excise and

another, is apposite for fastening the Revenue with binding force as regards the instructions issued, while constructing a notification which was not

free from doubt, learned Judges in that decision have observed thus :

One aspect deserves to be noticed in this context. The earlier Tariff Advice No. 83/81 on the basis of which Trade Notice No. 220/81 was issued by the Collector of Central Excise and Customs is binding on the department. It should be given effect to. There is no material on record to

show that this has been rescinded or departed from, and even so, to what extent. Even assuming that the latter Tariff Advice No. 6/85 has taken a

different view - about which there is no positive material - the facts point out that the concerned department itself was having considerable doubts

about the matter. The position was not free from doubt. It was far from clear. IN SUCH A CASE WHERE TWO OPINIONS ARE

POSSIBLE, THE ASSESSEE SHOULD BE GIVEN THE BENEFIT OF DOUBT AND THAT OPINION WHICH IS IN ITS FAVOUR

SHOULD BE GIVEN EFFECT TO. IN THE LIGHT OF THE ABOVE, IT IS UNNECESSARY TO ADJUDICATE THE OTHER POINTS

INVOLVED IN THE APPEAL IN THE MERITS.

[Emphasis supplied is in the citation]

18. Since no action has been taken for the alleged violation of the declaration, within 30 days from the date of export and even now the

department is only thinking of conducting an enquiry. In such circumstance, I think the petitioner must be granted the relief sought for.

19. In the result, there will be a direction against respondents 2 and 3 to complete verification of DEPB licences 1 to 4 issued by the fourth

respondent following the provisions of paragraph 7.43 of the Handbook of Procedures issued by the Ministry of Commerce and further permit the

petitioner to use the credit granted in respect of the said licences. Consequently, the writ is allowed. No costs. The connected W.M.P. is closed.