(2011) 07 KL CK 0137

In the High Court Of Kerala

Case No : Writ Petition (C) No. 5549 of 2007 (1)

Leotex APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 19-07-2011

Acts Referred:
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 12(1)

Citation : (2012) 281 ELT 173

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : A.M. Shaffique SR, for the Appellant; John Varghese, ASG, for the Respondent

Judgement

S. Siri Jagan, J.—The petitioner is a proprietary concern engaged in the business of export of various items like jute rugs, coir door mats, matting, carpets, grass mats etc., to various foreign countries. The Government of India offers benefits to exporters under various schemes like DEPB Scheme, Draw Back Scheme, Advance Authorisation Scheme, DFRC Scheme etc. Originally, for certain exports, the petitioner thought of availing the benefit of DEPB scheme. Therefore the petitioner submitted shipping bills complying with the procedure prescribed for availing of the benefit under the DEPB scheme. Subsequently, the petitioner realised that it is more advantageous to the petitioner to claim draw back under the Customs, Central Excise Duties and Service Tax Drawback Rules (for short ''Drawback Rules''). Therefore, the petitioner applied to the Commissioner of Customs by Ext. P4 for consideration of their claim under Rule 12 of the Drawback Rules exempting the petitioner from complying with the provisions of the Rule since the petitioner had originally made the export complying with the requirements for availing of the benefits under the DEPB scheme. But, the Assistant Commissioner by Ext. P5 letter, rejected the claim of the petitioner treating the same as a claim for conversion from DEPB scheme to draw back scheme, on the ground that the petitioner''s claim for DEPB scheme has not been denied, which is a condition precedent for conversion of the claim under the

DEPB scheme to one under the Drawback scheme. This is apparently on the basis of Exts. P1, P2 and P3 circulars issued by the Government of India in respect to conversion of shipping bill under one scheme to that under another scheme, whereby as per Ext. P3 circular, denial of benefit under one scheme was made a condition precedent for applying for conversion from that scheme into another scheme. The petitioner submits that because of various decisions of the Tribunal, which have been upheld by this court, the Government themselves have issued another Circular dated 23-9-2010, whereby the rigorous conditions in Exts. P1 to P3 have been subsequently liberalised but only prospectively. The petitioner''s primary contention is that the Assistant Commissioner had no jurisdiction to reject the claim of the petitioner insofar as the petitioner''s claim was liable to be placed before the Commissioner under Rule 12(1) of the Drawback Rules, the proviso to which gives a discretion to the Commissioner of Customs to exempt a particular exporter from complying with the provisions of the said Rule. As per the said Rule, the power to exempt an exporter from rigorous compliance with the requirement for claiming Drawback Rules is vested squarely with the Commissioner of Customs and therefore the matter should have been placed before the Commissioner of Customs and the Assistant Commissioner could not have, on his own, taken a decision, is the contention raised. The petitioner therefore seeks a direction to the Assistant Commissioner to place the matter before the Commissioner of Customs under the proviso to Rule 12(1) for a decision as to whether the petitioner''s claim for benefit of the Drawback Rules can be considered by the Commissioner waiving the procedural requirement in respect of the same. The respondents have filed a counter affidavit opposing the contentions. According to them. Ext. P 3 circular, which was in force at the relevant time, categorically specifies that only in case of denial of claim under one scheme, an exporter can seek conversion of his claim from that scheme to another. According to respondents, the petitioner''s claim for benefits under the DEPB scheme had not been denied by the appropriate authority at any time and therefore the petitioner cannot seek conversion of their claim from the DEPB scheme to one under the drawback scheme.

2. I have considered the rival contentions in detail.

3. It is true that the petitioner had originally filed their shipping bill for claiming the benefit under the DEPB scheme. But, that does not prevent the petitioner from claiming the benefit under the drawback scheme by resorting to Rule 12 without even seeking conversion from the DEPB scheme. Rule 12 reads thus:

Rule 12. Statement/declaration to be made on exports other than by Post. - (1) In the case of exports other than by post, the exporters shall at the time of export of the goods -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback and if so, at what rate or rates and make a declaration on the relevant shipping bill or bill of export that-

(i) a claim for drawback under these rules is being made;

(ii) in respect of duties of Customs and Central Excise paid on the containers, packing materials and materials and the service tax paid on the input services used in the manufacture of the export goods on which drawback is being claimed, no separate claim for rebate of duty or service tax under the Central Excise Rules, 2002 or any other law has been or will be made to the Central Excise authorities.

Provided that if the Commissioner of Customs is satisfied that the exporter or his authorised agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his authorised agent, and for reasons to be recorded, exempt such exporter or his authorised agent from the provisions of this clause:

(b) furnish to the proper officer of Customs, a copy of shipment invoice or any other document giving particulars of the description, quantity and value of the goods to be exported.

(2) Where the amount or rate of drawback has been determined under rule 6 or rule 7, the exporter shall make an additional declaration on the relevant shipping bill or bill of export that -

(a) there is no change in the manufacturing formula and in the quantum per unit of the imported materials or components, if any, utilised in the manufacture of export goods; and

(b) the materials or components, which have been stated in the application under rule 6 or rule 7 to have been imported, continue to be so imported and are not being obtained from indigenous sources.

(Underlining supplied)

Under the proviso to Rule 12(1), the discretion is vested with the Commissioner of Customs to waive the conditions for claiming the benefit under the drawback scheme. Therefore, even without getting the claim of the petitioner denied under the DEPB scheme, the petitioner could have independently sought the benefit of the proviso to Rule 12(1). As such, the consideration of Exts, P1 to P4 circulars or the present Circular dated 23-9-2010 is not mandatory at all. In fact, the latest Circular dated 23-9-2010 shows that in view of the decisions of the Tribunal and this court on the question, the Government themselves had decided to liberalise the provision regarding even conversion from one scheme to another. In the above circumstances, I do not think that the petitioner could have been prevented from having their claim, considered under Rule 12, particularly the proviso to Rule 12(1). The power to consider the claim under the proviso to Rule 12 is squarely on the Commissioner of Customs. As such, the Assistant Commissioner of Customs was bound to place the matter before the Commissioner of Customs for an order under the proviso to Rule 12(1) of the Drawback Rules. Obviously, the Assistant Commissioner had not done that, apparently on the ground that the petitioner''s claim was for conversion from one scheme to another, which was permitted only in cases where their claim under the DEPB scheme was denied. In the above circumstances, this writ petition is disposed of with the following directions The 4th respondent shall place the claim of the petitioner before the 3rd respondent within two weeks from the date of receipt of a copy of this judgment. The 3rd respondent shall consider the claim of the petitioner for benefits under the drawback scheme by exercising his discretion under the proviso to Rule 12(1), as expeditiously as possible, at any rate, within two months from the date of receipt of a copy of this judgment, after affording an opportunity of being heard to the petitioner. I record the submission of the petitioner that the petitioner has already abandoned his claim under the DEPB scheme.

