
(2014) 01 DEL CK 0118

In the Delhi High Court

Case No : Writ Petition (C) 1886 of 2013 and C.M. Application 3597 of 2013

Maalvika Impex (India)

APPELLANT

Vs

Commissioner of Customs and Another

RESPONDENT

Date of Decision : 27-01-2014

Acts Referred:

Citation : (2014) 310 ELT 868 : (2014) 25 GSTR 244

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Navneet Panwar,s 13 and 14, for the Appellant; Kamal Nijhawan, Senior Standing Counsel, Sh. Sumit Gaur and Ms. Dinesh Patel, Advocates 13 and 14, for the Respondent

Judgement

S. Ravindra Bhat, J.—The petitioners seek an order quashing and setting-aside of the order of the Joint Secretary, Department of Revenue, Govt. of India dated 13.08.2012. The facts of this case are that the petitioners are merchant exporters of readymade garments. During the course of assessment proceedings, they relied upon Circular No. 54/2001-Cus dated 19.10.2001 and Circular No. 16/2009-Cus dated 25.05.2009, which according to them enabled the setting-off of the duty element in respect of the inputs purchased from the open market. In the assessment proceedings as well as the revision which led to the impugned order, the contentions urged by the petitioners were turned down. It consequently has approached this Court for setting-aside of that order.

2. The respondents' position is that the impugned order does not require any interference. The respondents rely upon the same Circular No. 16/2009-Cus and highlight para no. 7 to submit that the relief is qualified in that offsetting is permitted subject to fulfilment of certain conditions. It is emphasized that in this case, the petitioner did not fulfil those conditions. The respondents also rely upon an investigation report to suggest that the writ petitioners did not satisfy the concerned authority that in fact the inputs were duty-paid. The respondents state that the Circular of 2009 is prospective.

3. The petitioners have in these proceedings relied upon a decision of this Court-Commissioner of Customs (Export) Vs. Kultar Export, . The Court had then examined the very same issue, i.e. the permissibility of benefit of duty element in the cost of inputs of such merchant exporters. The Court had considered the relevant Circulars dated 64/1998 dated 01.09.1998; 54/2001-Cus dated 19.10.2001 as well as another Circular No. 08/2003 over and above Circular No. 16/2009-Cus. In that case, this Court had affirmed the decision of Tribunal which had inter alia held as follows:

8. The Tribunal proceeded to over-rule the Commissioner's argument and held as follows:-

12. On a careful reading of paras 1 and 6 as also from item 4 of Annexure-I and items 4 and 5 of Annexure-II of Circular 54/2001-Cus it is clear that this circular and certificates as per this Circular are not applicable for merchant exporters who buy goods from open market and we have no difficulty in concluding that this circular is not applicable to merchant exporters who procure goods from the open market and the Appellant was not required to give such certificates. So the very basis of on which SCN is issued is not sound.

13. The only issue to be examined is whether the demand is to be sustained in view of para (iv) of Circular 17/97-Cus. and para (vi) of Circular 64/98 though these are not relied upon in SCN. As per these circulars the Appellant should not have been given the impugned drawback. There was no question of taking any declarations. The only relevant information was that the Appellant was a merchant exporter, which was always known to the department. As may be seen from para 1(iv) of Circular 17/97-Cus. and para 1(vi) of Circular 64/98-Cus. there was no question of taking any declaration from merchant exporters who buy goods from the open market as in the case of this Appellant but the drawback was supposed to be restricted to the customs portion only. However Revenue chose to grant drawback for excise portion also and after lapse of five years to one year, the drawback amounts granted on various shipping bills have been demanded to be paid back. There is also an argument that this Appellant is being singled out for such treatment. This argument is relevant not in the sense whether a wrong can be corrected in the hands of one when others go scot free but in the context that there was a bona fide relief because of the circulars from 2001 onwards that they were eligible for the impugned drawback.

14. We are not inclined to confirm such huge liability for past periods based on Circulars which were in the knowledge of the department and which were not implemented. We would like to rely more on the legal provisions. The only legal provision relied upon is Rule 3 of the drawback Rules. We agree with the interpretation to this Rule given by the Board in Circular 16/2009-Cus. The argument that this interpretation is applicable from date of issue of Circular 16/2009-Cus. Is repugnant to logic because the Rule has remained the same except for amendment on 13-7-2006, to take care of incidence and rebate of Service Tax. So we are not inclined to rely on the word "henceforth" used in para

7 of this circular and uphold this demand.

4. Having regard to the above, this Court is of the opinion that the petitioners too are entitled to the same relief as per the decision in Kultar Export (supra). The impugned order, disallowing Central Excise portion of the drawback, in terms of the adjudicating authority and revisional order is hereby set aside. The writ petitions and pending applications are allowed in the above terms.