
(2016) 01 BOM CK 0067
In the Bombay High Court
Case No : Customs Appeal No. 1 of 2014

Manawat Plastics Pvt. Ltd.

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal and
Others

RESPONDENT

Date of Decision : 05-01-2016

Acts Referred:

Customs Act, 1962 — Section 130

Citation : (2016) 1 BCR 850

Hon'ble Judges : B.P. Dharmadhikari and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : Varun Sinha and Nitin Rode, Advocates, for the Appellant;

Final Decision : Dismissed

Judgement

B.P. Dharmadhikari, J.—1. The appellant - assessee has filed this appeal under Section 130 of the Customs Act, 1962, assailing the order dated 12.05.2014 passed by Respondent No. 1 - The Customs, Excise & Service Tax Appellate Tribunal (CESTAT) and seeking conversion of Shipping Bill under DEEC Scheme to Drawback Scheme to avail export benefit. The CESTAT in the impugned order mentions that the Commissioner denied the conversion as CBEC Circular No. 4 of 2004 dated 16.01.2004 permitted such conversion only when benefit under Duty Exemption Entitlement Certificate Scheme (DEEC Scheme) is denied by DGFT/ Ministry of Commerce or Customs Authorities.

After hearing the Consultant for the appellant - assessee, the CESTAT took note of the contention that the exported goods were examined, their value was verified and the quantity was taken into consideration while allowing clearance. In para 7, it has taken note of the Circular dated 16.01.2004 (supra) and found that the benefit under DEEC Scheme was not denied to the appellant. Therefore, denial by the Commissioner has been upheld. Thus, only limited issue argued before this Court by the appellant is whether such denial is really necessary.

2. We have heard Shri Sinha with Shri Rode, learned counsel for the appellant - assessee and also Shri Deshpande, learned counsel for respondent No. 2 - Department. After appellant's arguments, learned counsel for the department completed his reply. Then as requested by local counsel for the appellant, date as desired by outstation counsel for the appellant was given to sum up. The said date was 30.10.2015 which happened to be the last working day before Diwali Vacation. On that date, outstation counsel for the appellant could not attend as he was not keeping good health. We, therefore, granted him leave to place on record his rebuttal to reply arguments in writing and closed the appeal for orders. Those written reply arguments have been tendered on 16.11.2015. However, the matter appeared on 17.11.2015, before the Division Bench comprising of B.P. Dharmadhikari and V.M. Deshpande, JJ. This inadvertent listing was pointed out by the parties and accordingly on 17.11.2015, the concerned Bench took note of the fact that the matter was already closed for orders by the earlier bench.

3. The facts giving rise to the controversy can be briefly mentioned from the order passed by the Commissioner on 10.02.2011. The appellant exported Woven PP Bags/Fabrics under Shipping Bill No. 3542 dated 06.08.2002, No. 3657 dated 13.08.2002 and 4251 dated 16.09.2002 under DEEC Scheme. On 20.08.2003, the assessee requested for conversion of these DEEC Shipping Bills to Drawback Shipping Bills claiming its inability to utilize Advance License issued against the above export products for Import of Duty Free raw material. The goods were exported from factory premises of their supporting manufacturer under DEEC Scheme. On 19.04.2004, the assessee requested to consider their request or to issue an appealable order. Consequently, a show cause notice dated 24.05.2004 asking them as to why their request dated 20.08.2003 should not be rejected. This show cause notice was adjudicated by the then Commissioner on 22.07.2004.

4. This Commissioner has found that since weighment was not done, the request for conversion could not have been accepted. Against this order dated 22.07.2004, the assessee filed Appeal before the CESTAT. On 09.06.2005, CESTAT remanded the matter for fresh adjudication. The Commissioner again rejected conversion on 05.10.2006. This order was challenged before the CESTAT and on 11.05.2007, CESTAT set it aside. The order of CESTAT was questioned before this Court by the department and on 17.12.2008, Appeal was partly allowed. The matter was sent back to the Tribunal for de novo consideration. The Tribunal, in turn, on 08.07.2010, remanded the matter to the Adjudicating Authority for fresh decision. The order after fresh decision has been passed on 10.02.2011. After giving due opportunity to the assessee and after personal hearing, the adjudicating authority i.e. the Commissioner found that it had to decide whether the application of noticee for conversion of DEEC Shipping Bill to Drawback Shipping Bill was correct and proper. In para 10.3 of said order, the Commissioner takes note of the fact weight of export commodity as certified in export invoice attained finality. It further found in para 10.5 that the parties

agreed that there was no dispute about fact of export and realization of export proceeds. In this background, it proceeded to look at Board's circular dated 16.01.2004 having No. 4 of 2004.

5. In para 13.1, it has recorded a finding that the assessee/noticee on their own failed to utilize the Advance Licenses and it was not their case that the department prevented it from availing the benefit of DEEC Scheme. It further found that the conversion was not claimed within one month and the request was made almost after one year. Request for reconversion was, therefore, held to be by way of after thought. In para 13.3, it has taken note of the fact that the circular speaks about permitting conversion of "Free Shipping Bills" into "Drawback Shipping Bills" and the assessee never filed Free Shipping Bills. It exported goods under quantity/value based Advance license. Hence, the case of assessee/noticee does not fall under para 3.1 or 3.2 of the Circular. It then takes note of settled legal position that circulars issued by the Board are binding on the department and relies upon the judgment of the Hon'ble Apex Court in the case of CCE, Vadodara v. Dhiren Chemical Industries, reported at , 2002 (139) ELT 3 (SC). It took note of the fact that the Circular dated 16.01.2004 supersedes all earlier circulars issued by the Board. In view of these findings, it rejected the request for conversion.

6. The impugned order passed by the CESTAT on 12.05.2014 is already briefly mentioned by us in opening paragraph, supra. It is in this background that we have to consider the contentions of the respective counsel.

7. Shri Sinha with Shri Rode, learned counsel for the appellant pointed out that Rule 12(i)(a)(2) has come into force on 13.07.2006 while here export in relation to which advance license was issued is of the year 2002. As such, said rule could not have been made applicable retrospectively. He further adds that rebate has been allowed only on finished product and the authorities have accordingly issued certificates mentioning that facility available under Rules 18 and 19 of the Central Excise Rules, 200, has not been availed in respect of exempted goods. The export documents i.e. Form No. ARE-1 expressly stipulated that it was under claim of duty drawback under the Customs & Central Excise Duties Drawback Rules, 1995. The documents also reveal that drawback on customs portion only was claimed. The certificate expressly mentions that exported goods were not manufactured by availing facility under Notification Nos. 41 of 2001 and 43 of 2001 of Central Excise issued under Rules 89 and 90 of Central Excise Rules, 2001. The request for conversion also pointed out that drawback was in relation to custom portion only and it also revealed weight of exported products along with necessary details. The details of advance licenses were also given in it and inability to utilize the same on account of financial problems was also pointed out. He, therefore, submits that the order in original passed by the Commissioner or then the appellate order passed by the CESTAT show total non application of mind in present facts.

8. Shri Sinha, learned counsel adds that other facts not being in dispute, the

impugned order which rejects the request for conversion only due to the circular dated 16.01.2004, is unsustainable.

9. Shri Mirza, learned counsel appearing for the department points out that rebate claimed was sanctioned by the Commissioner on 27.08.2002 because of declaration contained in declaration for removal of excisable goods in Form No. ARE-1 on 05.08.2012. Rule 12(a)(1)(ii) requires a statement that no rebate has been claimed and Rule 12(ii) also requires that there should not be separate claim for rebate. In this situation, when the appellants obtained two advance licenses, they have not produced it on record. The advance license is always issued for import in future and, therefore, duty free material imported on its basis, must be used in production. The appellants have not imported any such material and as such, have not produced any final produce by consuming it. There is no export of such final product and hence, there is no question of rebate. The export on which the appellants rely, was also on the strength of advance license and, therefore, rebate has been sanctioned on goods which were cleared. He, therefore, states that the rebate was allowed on finished goods and imported raw material was received by the appellants duty free. In this situation, according to him, no case is made out and reliefs as claimed cannot be granted.

10. The questions of law sought to be raised by the appellant in this appeal under Section 130 of the Customs Act, 1962, are as under :

"(I) Whether the Customs, Excise & Service Tax Appellate Tribunal was right in relying upon the contents of Board's Circular No. 4/2004-CUS dated 16.01.2004 when the Appellant's application for conversion of Shipping Bill was made on 20.08.2003?

(II) Whether Customs, Excise & Service Tax Appellate Tribunal is right in ignoring the Board's Circular dated 10/2003-CUS dated 12.05.2003 which was applicable in Appellant's case and which had relaxed the requirement of rejection of one Export Promotion Benefit Scheme by DGFT/Customs?

(III) Whether Learned Appellate Tribunal as well as the Commissioner was justified in not considering claim of the Appellant's in the light of Rule 12(1) (a) of the Customs and Central Excise Duty Drawback Rules, 1995, independently of the Circulars relied upon by the department?

(IV) Whether the claim of Appellant's is covered under Rule 12(1)(a) of the Customs and Central Excise Duty Drawback Rules, 1995, for conversion of the DEEC Shipping Bill into Drawback Shipping Bills based on the documentary evidence brought on record by the Appellant's?"

11. The facts noted by us supra show that advance licenses in favour of the appellant are issued on 26.08.2002 and 09.09.2002. Vide Question No. 1, the effort is to demonstrate that Circular dated 16.01.2004 could not have been applied retrospectively to the application for conversion which was filed on 20.08.2003. If this argument is to be accepted, the position prevailing on the day

of respective exports may assume significance. However, not pointing it out, the appellants seek benefit of circular dated 12.05.2003. Thus, on one hand they wish to avoid retrospective application of circular dated 16.01.2004 while on the other hand seek application of circular dated 12.05.2003 from an earlier date.

12. The provisions which regulate the conversion are contained in Rule 12. As per said rule, the exporter has to declare on his Shipping Bill or Bill of Export, description, quantity and such other particulars, as are necessary for deciding whether goods are entitled to drawback and if yes, the rate thereof. He has to also specify whether a claim for drawback under Rule 12 is being made. He has also to specify that no separate claim or rebate of duty or for service tax under Central Excise Rules, 2002, or any other law has been or will be made in respect of duties of Customs and Central Excise paid on containers, packing materials and service tax paid on input service used in manufacture of exported goods. It is no doubt true that this provision has come into force on 13.07.2006 and was not in force in 2002. However, obvious intention is to avoid same benefit being availed again. To us, it appears to be clarificatory in nature & therefore, regulating the case of Appellant also.

13. The advance license is always issued to allow duty free import of inputs which are physically incorporated in export product. Thus, advance license is to be used in future and is never issued for imports already made or exports effected. It casts an obligation on person using advance license that he exhausts the raw material imported duty free on its basis in manufacturing of a final product & exports it.

14. The perusal of order dated 11.05.2007 passed by the CESTAT reveals that in para 2, it takes note of the fact that Invoice dated 05.08.2002 certified weight of exported product to be 23100 kgs., while gross weight to be 23265 kgs., and it is also reflected in corresponding Shipping Bill dated 06.08.2002. Because of this finding, the objection of department against conversion was overruled. The second objection about non production of original Advance License was also overruled in the absence of any finding that duplicate Advance License produced by the appellant was not genuine. Needless to mention that this order was set aside by this Court in Customs Appeal No. 4 of 2007 on 17.12.2008 and then fresh order was passed.

15. In fresh order passed by the CESTAT dated 08.07.2010, though the weights have not been mentioned or reproduced, in para 2, the fact of mention of weight in kgs., in Shipping Bills appears. The matter was sent back to the Commissioner by it & the Commissioner has passed the fresh order on 10.02.2011. In this order, in para 10.3, there is an observation that examining officer's report dated 12.05.2004 to the effect that he did not weigh the export consignments is contradictory to his certificates on the back of factory invoices and relevant packing lists. It is also mentioned that weights as certified under the export invoice have attained finality. The impugned order is passed in further appeal preferred against this order by the department. In the impugned order dated

12.05.2014, the aspect of production of duplicate advance license or then dispute about weight being mentioned, has not been gone into. Only one ground is looked into & the appeal came to be dismissed thereby leaving other aspects untouched.

16. In earlier order of the Commissioner dated 25.10.2006, in para 21, the said Commissioner takes note of the fact that the appellant - assessee took a stand that weight of export consignments, both gross as well as net weight has been specifically mentioned in documents relied upon by him i.e. ARE-1-EXP/01 dated 24.04.2002 and Shipping Bill No. EXP/01 also dated 24.04.2002. It has noted that while ARE-1 carried certificate from the Range Officer, the Shipping Bill was with an endorsement of the Assistant Commissioner of Customs while clearing goods for export. Based on these certificates, Drawbacks and rebates were sanctioned by the Assistant Commissioner, I.C.D., Nagpur and the Assistant Commissioner, Central Excise Division - I, Nagpur. The Commissioner found that these documents were not contemporaneous documents i.e., in relation to exports with which request for conversion was being processed. The truthfulness or otherwise of one set of documents in such cases cannot be made applicable to the other set of documents merely because such documents had some similarity. We also endorse this finding as each export & shipping bill will constitute an independent document to be understood only in the context of data contained therein. No inference can be drawn that formalities shown to be complied with in some other export instance must have been completed in other matter also.

17. These facts are required to be mentioned because two Advance Licenses pressed into service here & with which this Court is concerned, mention the weights separately. Their details are contained in the order of the Commissioner dated 22.07.2004. Those are :---

(A) Advance License Nos. 03101055112/3/0300 dated 26.08.2002

18. In application dated 20.08.2003 moved by the appellant for conversion of DEEC Shipping Bills to Drawback Shipping Bills, Invoice number and dates are given. Thus, the conversion sought is in respect of Export/02, Export/03 and Export/04. These invoices are dated 07.08.2002, 18.08.2002 and 20.09.2002 respectively. The quantity of Export product has been mentioned in kgs as 23100 kgs, 25200 kgs and 12831 kgs. Thus, total net weight of these three exports is mentioned as 61131 kgs. On next page, the details of two Advance Licenses are given and they are as under :

19. Thus, the difference in quantity in kilograms as mentioned in these two documents in relation to very same Advance Licenses needs to be noted. The fact that original advance licenses were not produced by the appellant, therefore, becomes significant. Moreover, if the authentic documents or details about weight were already available with the appellants, it is apparent that it was unnecessary for the appellant - assessee to attempt to persuade the Commissioner on 25.10.2006 by giving the illustration of Exp/01 dated

24.04.2002. Thus, facts on which law needs to be applied are not settled finally in this case.

20. In memo of appeal, the appellant has annexed specimen copy of ARE-1 and Shipping Bills as Annexures IV and V. Similarly, a specimen copy of certificate which carries necessary details has been produced with Annexure VI and VII. Copy of one rebate sanction order is produced as Annexure VIII. Similarly, the copies of documents such as Export Invoice, Bale wise Packing list, stuffing order, ARE-1, Shipping Bill, Bill of Lading and Drawback sanction order in respect of one previous export, are filed as Annexure IX.

21. In fact, during the arguments, our attention was invited to such specimen copy at Annexure I V. It is in respect of removal of product on 05.08.2002 and it also carries a remark that export was under quantity based Advance License. It also stipulates the amount of rebate claimed as Rs. 2,32,848/-.

22. At this stage it will be proper to take note of the law. The legal provisions in this respect are contained in Customs, Central Excise Duties and Service Tax Drawback Rules, 1995. Rule 12 is the relevant rule, it reads as under :

"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 or 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 [Principal Commissioner of Customs or Commissioner of Customs, as the case may be] 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."

Thus, the Principal Commissioner of Customs or the Commissioner of Customs has been given power or discretion to exempt an exporter or his authorised agent from satisfying the requirements provisions of Rule 12(1)(a). The Government of India, Ministry of Finance has on 28.01.2003 issued Circular No. 6 of 2003 on conversion of Free Shipping Bills into Advance License/DEPB etc. As per para 4 of this circular, the Government has specified that conversion of Shipping Bill may be allowed when an exporter, who wanted to avail the benefit of Export Promotion Scheme was forced to file Free Shipping Bill. That is not the situation in the present matter. The second contingency is where exporter files a Shipping Bill under a particular Export Promotion Scheme but benefit of that scheme was denied to him by DGFT or Customs. Again that is not the situation here.

23. It is not in dispute before us that such application for conversion is required to be made within 30 days. Thus, the claim here is also filed beyond stipulated time. Circular No. 40 of 2003 dated 12.05.2003 addresses the grievance of exporters that they are forced to file Free Shipping Bill & for the purposes of seeking its conversion at a later date, it becomes difficult for them to prove this fact. It amends the circular No. 6 of 2003 dated 28.1.2003. Amendment was made on account of the fact that no written orders forcing the exporters to file free shipping bills, were issued by the Custom authorities. The Commissioner has been given power to examine every such case on its merits as per conditions specified in paras 4(a), (b) and (c) of Circular No. 6 of 2003 with added condition that exporters should not have availed benefit of any Export Promotion Scheme and no fraud/suspected manipulation and no investigation have been made against the party - exporter in respect of such export.

24. Though it is claimed by the Appellant that the rebate has been allowed only on customs duty paid on finished product and the authorities have accordingly issued certificates mentioning that facility available under Rules 18 and 19 of the Central Excise Rules, 2002, has not been availed in respect of exempted goods, document at Annex. IV (specimen) shows the amount of rebate claimed in column 11. In column 12 i.e., next column with header "Remarks", export is certified to be under quantity based advance license No. 445316. This advance license number or its date is not very clear. Rebate of Rs. 2,32,848/- is paid to Appellant on 27.8.2002 as per document at Annex. VIII with the appeal memo.

Input is imported duty free as it was under an advance license in discharge of export obligation as per paragraph 4 of the ARE-1 dated 5.8.2002. Similar documents in relation to export 2 & 3 on 26.8.2002 and export 4 on 9.9.2002 are not placed before us. Even if Annex. IV is accepted as pertaining to export 2, it is obvious that no advance license need have been claimed against that export. If it could have been claimed, no grievance is possible as it has not caused any prejudice to the appellants. Appellants can not blame the department for their financial inability to use the two advance licenses.

25. Perusal of application for conversion dated 20.8.2003 shows that there the export 2 is shown to be connected with ARE-1 dated 5.8.2002, export 3 with ARE-1 dated 12.8.2002 while export 4 with ARE-1 dated 14.9.2002. In this application, after giving the chart correlating the invoice, export product, ARE-1, DEEC Shipping Bill Nos. ; drawback rate for custom portion only has been pointed out. Inability to use advance licenses issued against these exports for import of duty free raw material is also pointed out. Dates of these two Advance licenses are 26.8.2002 & 9.9.2002 respectively. From contents of application it appears that advance license dated 9.9.2002 is for export 4 where corresponding ARE-1 is of date 14.9.2002 & bill of lading is dated 20.9.2002. All these facts find no consideration in order of CESTAT. CESTAT ought to have recorded its findings on all these aspects. The order in original dated 10.2.2011 challenged before it holds that appellant had exported the product under quantity/value based advance license & had not filed free shipping bills; therefore, they do not fall under the paras 3.1 & 3.2 of the Circular No. 4/2004 dated 16.1.2004.

26. The order of CESTAT though may contain only one ground, Appellant can not succeed if it does not show the other findings of the Commissioner in order in original, to be perverse. Commissioner has in paragraph 12 of his order emphatically observed that circular dated 16.1.2004, being clarificatory in nature, will apply to even pending applications. It is not seriously attacked before us. Appellant has advanced no arguments to show that it is not clarificatory in nature and takes away any of its vested rights. Question attempted to be raised is whether shipping bills of appellant can be allowed to be converted into DPEB scheme. The object of the scheme is export promotion & it has to be kept in mind while evaluating the present controversy. May be, the Appellant had two advance licenses which must be putting normally under an obligation to use raw material to be imported duty free on its basis towards the manufacture of finished product to be exported. If the raw material is not imported, there is probably no loss to the appellant. No arguments to show any such deprivation or injury are advanced. Question of drawback will also arise, if there is actual import of material & then an export of finished product manufactured using that material. Other two ARE-1 in respect of Export 3 & 4 are not produced. If the drawback in all three ARE-1 was restricted to the excise portion of finished product only, then said proportionate drawback or rebate could have been received back in cash on same lines as per rebate cheque for Rs. 2,32,848/- dated 27.8.2002. It may not have been necessary to seek any advance license

against it. No rebate is perhaps possible for imported raw material used to manufacture exported finished products. All these facts could have been verified from the terms of the documents had the appellant produced the advance licenses on record. We feel that here when the facts are not clear, this aspect can not be gone into. The Appellant ought to have raised a specific question of law on such facts. No question of law regarding the permissibility of conversion of advance licenses into a drawback facility in present facts has been specifically raised.

27. We therefore find that the Appellants have failed to raise any substantial question of law in this Appeal. Same is accordingly dismissed with no orders as to costs.