

---

**(2012) 04 MAD CK 0124**

**In the Madras High Court**

**Case No :** Writ Petition No. 21014 of 2011 and M.P. No. 1 of 2011

Medopharm

APPELLANT

Vs

Joint Secretary To The Govt. of India

RESPONDENT

---

**Date of Decision :** 27-04-2012

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Customs Act, 1962 — Section 128(1), 129DD, 74, 75

**Citation :** (2012) 194 ECR 187 : (2012) 283 ELT 20

**Hon'ble Judges :** M. Jaichandren, J

**Bench :** Single Bench

**Advocate :** N. Viswanathan, for the Appellant; K. Ravi Anantha Padmanaban, CGSC and P. Mahadevan, SCCG, for the Respondent

**Final Decision :** Dismissed

---

## **Judgement**

M. Jaichandren, J.—Heard the learned counsel appearing for both sides. It has been stated that the petitioner firm is a partnership firm, registered with the Central Excise authorities. It has been granted the registration for the manufacture of excisable goods.

2. The petitioner firm has also obtained the necessary licence, in terms of the Drugs and Cosmetics Act, from the drug authorities concerned, for the manufacture of certain drugs in its factory situated at Kayarambedu village, Chengleput District. The petitioner has also engaged in the export of its finished goods. During the course of its business, the petitioner firm had imported a consignment containing 5,000 kilograms of Metronidazole BP 98, for the purpose of manufacture of its finished goods, from its overseas supplier, namely, M/s. China Jiangsu International Economic Technical Corporation, Nanjing, China, vide invoice No. CSU 20211113, dated 29-11-2000. The said goods had been cleared on demand of the appropriate customs duty, duly assessed by the customs authorities concerned. Thereafter, the petitioner firm had imported another consignment containing 12,000 kilograms of the product, from M/s. National

Service Corporation, China. The said goods had also been cleared on demand of the necessary customs duty, in terms of the various ex-bond bills of entry. After the clearance of the goods, they had been taken to the registered factory of the petitioner's firm, for the manufacture of tablets. The petitioner firm had availed the benefit of the input duty credit in terms of the Cenvat credit Rules in force at the relevant point of time.

3. It has been further stated that the customs authorities concerned had also asked the petitioner firm to pay Anti-Dumping Duty leviable on the goods cleared by them, as the goods had been imported from China. The petitioner firm had also paid the Anti-Dumping Duty, as claimed by the authorities concerned.

4. It has been further stated that, on demand of the customs duty, as well as the Anti-Dumping Duty levied by the authorities concerned, the cost of the materials had gone up making it costlier than the similar goods available in India. Therefore, the petitioner firm had decided to re-export the goods to the foreign buyers. Accordingly, the petitioner had exported 3,000 kilograms of the materials (drum pack) to the overseas buyer, namely, M/s. Glosel Singapore Private Limited, vide shipping bill No. 1326488, dated 23-7-2001, for an FOB value of Rs. 8,09,855/- and another consignment of 10,000/- kilograms (drum pack), vide shipping bill No. 135643, dated 4-10-2001, for FOB value of Rs. 27,95,600/-, after obtaining a "No Objection Certificate" from the Assistant Drug Controller, Chennai Port, as per the requirement of the Export Import Policy.

5. It has been further stated that the petitioner had followed the normal course in preferring the drawback, in respect of the exported goods. However, the shipping bills had been filed, inadvertently, u/s 75 of the Customs Act, 1962, instead of filing the claim, u/s 74 of the said Act. The goods had been exported by the petitioner in its original packing, as received from the overseas suppliers. The goods had been physically verified and stuffed in the containers at their factory premises, in the presence of the customs officers concerned. Thereafter, the petitioner firm made the necessary application for the fixation of the brand rate of drawback and for its sanction, with the jurisdictional Commissioner of Central Excise, on 20-9-2001. In response, the petitioner firm had received a letter from the Deputy Commissioner of Central Excise (Customs Policy), dated 26-11-2001, returning the documents filed by it stating that the claims made by the petitioner firm cannot be processed, u/s 75 of the Customs Act, 1962, without putting the imported goods to the necessary process. Consequently, the petitioner firm had requested the second respondent, by a letter, dated 4-12-2001, for the sanctioning of the drawback, in terms of Section 74 of the Customs Act, 1962.

6. While so, the second respondent had issued a show cause notice, dated 24-9-2003, proposing to reject the claims made by the petitioner firm. The petitioner had attended the personal hearing provided by the second respondent, on 18-10-2003, and had filed written submissions, along with the necessary documentary evidence to support his claims, for the drawback, which the

petitioner firm is entitled to, in terms of Section 74 of the Customs Act, 1962. A fresh hearing had also been given to the petitioner firm. However, the second respondent, vide his Order-in-Original No. 5999 of 2007, dated 13-3-2007, rejected the drawback claims made by the petitioner firm, purely on procedural grounds, stating that the shipping bills for the drawback had been made wrongly, u/s 75 and not u/s 74 of the Customs Act, 1962, which is the correct provision of law.

7. Aggrieved by the order passed by the second respondent the petitioner firm had preferred a statutory appeal u/s 128(1) of the Customs Act, 1962, before the Commissioner of Customs (Appeals), Chennai. The appellate authority, vide its Order-in-Appeal C. Cus. 577 of 2009, dated 29-6-2007, rejected a part of the claim made by the petitioner firm, pertaining to 5,000 kilograms of Metronidazole stating that the batch numbers of the imported drugs did not find place in the corresponding shipping bills, under which they were claimed to have been exported, overlooking the fact that the invoice raised by the petitioner firm, for the exports of the goods, and the other documents filed at the time of the importing of the goods, which had been filed along with the drawback claims contained the necessary particulars. In the order passed by the appellate authority, it had been stated that the petitioner firm was eligible for the drawback, u/s 74 of the Customs Act, 1962, to the extent of 8,000 kilograms of Metronidazole. However, it was held that the petitioner firm would not be eligible for the drawback for 5,000 kilograms of materials, as the batch numbers did not tally with the bills of entry concerned.

8. Aggrieved by the portion of the order of the Commissioner of Customs (Appeal), disallowing the drawback claims made by the petitioner firm, in respect of 5,000 kilograms of Metronidazole, the petitioner firm has preferred a revision application before the first respondent, as provided u/s 129DD of the Customs Act, 1962. The Department had also filed a revision application against the allowing of the drawback claimed by the appellate authority to the extent of 8,000 kilograms of the material. By a common order, dated 6-4-2011, the first respondent had passed an order holding that the petitioner firm had failed to comply with the statutory conditions and the procedures laid down in Section 74 of the Customs Act, 1962, and the Rules 4 and 5 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995. Thus, the drawback claim made by the petitioner firm was not held as admissible u/s 74 of the Customs Act, 1962, and therefore, the revision application filed by the petitioner has been dismissed and the revision application filed by the Commissioner of Customs, Chennai, had been allowed.

9. Aggrieved by the said order, the petitioner has preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

10. In the counter affidavit filed on behalf of the respondents, it has been stated that the exporter had applied for the fixation of Brand Rate, to the Jurisdictional Commissioner of Central Excise, Chennai, on 20-9-2001. In response to the said

application, the Deputy Commissioner of Central Excise (Customs Policy) had informed, vide letter, dated 26-11-2001, that the imported goods had been re-exported without any process and therefore, the application had been returned. Consequently, the exporter had requested, vide letter, dated 4-12-2001, for the sanctioning of drawback, u/s 74 of the Customs Act, 1962.

11. It had been further stated that the petitioner had imported 17,000 kilograms of Metronidazole from China, in two consignments. Both the consignments were cleared. Subsequent to the clearance of the goods, the petitioner had been asked to pay Anti-Dumping Duty, as it had not been collected at the time of the clearance of the goods. Accordingly, the petitioner had paid Anti-Dumping Duty of Rs. 27,02,601/-, for 13,000 kilograms of Metronidazole.

12. It had been further stated that the petitioner had exported 13,000 kilograms of Metronidazole, vide two shipping bills, under brand rate of drawback, declaring that the goods were imported goods. The claims for drawback had been rejected by the Central Excise Authorities stating that the materials exported did not undergo any manufacturing process and therefore, they were not eligible for Brand Rate of drawback. Therefore, the petitioner had requested the customs authorities, vide letters, dated 3-12-2001, and 17-12-2001, for drawback of Anti-Dumping Duty for 9,000 kilograms, and Customs Duty suffered by them for 3,500 kilograms, u/s 74 of the Customs Act, 1962. The CENVAT facility had been availed on CVD portions from the Central Excise authorities.

13. It had been further stated that, in case of re-export of goods imported under DEPB scheme, the Board's Circular No. 75/2000-Cus., dated 11-9-2000, specifies the conditions. As per the said circular, the re-export of the imported goods are allowed only if the said goods are found to be unfit for use, due to manufacturing defects. It had been further emphasized that the goods are to be re-exported, within six months from the date of import and the identity of the goods are to be established to the satisfaction of the Assistant Commissioner/Deputy Commissioner of Customs. The exporter had admitted that the goods were re-exported, as no suitable buyer had been found. Thus, it is clear that the goods in question were not defective in nature. Further, the exporter had not adhered to any of the conditions of the circular. Therefore, the claim of the exporter for drawback, u/s 74 of the Customs Act, 1962, had been rejected, by way of an Order-in-Original, by following the principles of natural justice.

14. Aggrieved by the Order-in-Original, rejecting the claim of the exporter for drawback, the petitioner had filed an appeal, before the Commissioner (Appeals), in Appeal No. C. Cus. No. 577/2009, dated 29-6-2009. The Commissioner (Appeals) had ordered that the petitioner was eligible for the drawback, u/s 74 of the Customs Act, 1962, to the extent of 8,000 kilograms. However, it had been held that 5,000 kilograms of materials, whose batch numbers did not tally with the Bills of Entry, were not eligible for the drawback.

15. Challenging the order in Appeal, the Department had filed an appeal before

the Customs, Excise and Service Tax Appellate Tribunal, on 13-1-2010. Further, a revision application had been filed by the Department, on 27-1-2010, before the Revision Authority, the Joint Secretary, with a request to condone the delay of 89 days. A revision application had also been filed by the petitioner challenging a portion of the order in appeal, which had stated that the petitioner would not be eligible for drawback, for 5,000 kilograms of materials. The Revision Authority, vide Order Nos. 75-76/2011-Cus., dated 6-4-2011, had passed a common order stating that the petitioner had failed to comply with the statutory conditions and the procedures laid down, in Section 74 of the Customs Act, 1962, read with the Re-Export of Imported Goods (Drawback of Customs Duties) Rules, 1995. Therefore, the drawback claim is not admissible, u/s 74 of the Customs Act, 1962. Aggrieved by the said order the petitioner had preferred the present writ petition, before this Court, under Article 226 of the Constitution of India.

16. It had been further stated that the contention raised on behalf of the petitioner that no proper notice had been given, by the Revision Authority, regarding the revision application filed by the fourth respondent, is of no relevance.

17. It had been further stated that, as per the provisions of Rule 4 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, the exporter shall state, at the time of the export of goods, the description, quantity and other such particulars, as are necessary for deciding as to whether the goods in question are entitled to drawback u/s 74 of the Customs Act, 1962. Such particulars are to be stated in the shipping bills or in the bills of export. Since, the petitioner had not filed the shipping bills, u/s 74 of the Customs Act, 1962, the statutory requirements had not been fulfilled by the petitioner.

18. It had been further stated that the claim of the petitioner, for the drawback, had been rejected, not only on the ground that the necessary particulars had not been furnished, as per the statutory requirements, but also on the ground that the goods in question were chemicals. In fact, the customs authorities did not take samples of the goods in question for the purpose of testing, as the shipping bills had not been filed, u/s 74 of the Act. It is seen, from the shipping bills, invoice, packing list and the examination report, that the fact of re-export of imported goods has not been declared by the petitioner. As the shipping bills had not been filed, u/s 74 of the Act, no verification of the goods had been carried out by the customs authorities.

19. It had been further stated that the goods in question had not been re-exported as per the provisions of Section 74 of the Customs Act, 1962. In fact, the goods had been re-exported, under the provisions of Section 75 of the said Act, which requires a different kind of verification and procedures to be adopted.

20. It had been further stated that the petitioner cannot rely on the letter of the Deputy Commissioner of Central Excise (Customs Policy), dated 26-11-2001, as the Central Excise Authorities had not physically examined the goods in question

and as the said letter is based on the petitioner's submission made to the Central Excise authorities concerned, while applying for brand rate. Further, Rule 4 of the Re-export of Imported Goods (Drawback of Customs Duties) Rules, 1995, cannot prevail over the provisions of Section 74 of the Customs Act, 1962, as claimed by the petitioner.

21. It had also been stated that no proper explanation has been given by the petitioner for its failure to file the relevant documents, u/s 74 of the Customs Act, 1962.

22. The learned counsel for the petitioner had relied on the following decisions in support of his contentions:

- (i) In Re : Cotfab Exports - 2006 (205) E.L.T. 1027 (G.O.I.).
- (ii) In Re : Scan Geographical As - 2011 (273) E.L.T. 452 (G.O.I.)
- (iii) In Re : Deesan Agro Tech Ltd. - 2011 (273) E.L.T. 457 (G.O.I.)
- (iv) Commissioner of Customs, Mumbai v. Terai Overseas Ltd. - 2003 (156) E.L.T. 841(Cal.)
- (v) Modi Revlon Ltd. v. Commissioner of Customs (Import) Mumbai - 2007 (209) E.L.T. 252 (Tri.-Mumbai).
- (vi) In Re : Torrent Pharmaceuticals - 2001 (138) E.L.T. 949 (G.O.I.)
- (vi) Rochiram and Sons v. Union of India - 2008 (226) E.L.T. 20 (S.C.).

23. In view of the submissions made by the learned counsels appearing for the petitioner as well as the respondents, and on a perusal of the records available, and on considering the decisions cited supra, this Court finds that the impugned order, dated 6-4-2011, passed by the respondent, with regard to the drawback claim, relating to 5000 kilograms Metronidazole, cannot be said to be invalid in the eye of law. From the records available, it is seen that the imported goods had been re-exported without undergoing the usual process of verification, as the shipping bills had been filed by the petitioner, under the drawback scheme, in terms of Section 75 of the Customs Act, 1962, and classified drawback Tariff Item No. 9801 meant for brand rate. It is also noted that the accompanying invoice had the "No Objection, endorsement given by the Assistant Drug Controller, which was the usual procedure for the export of drugs, as per the export and import policy.

24. It is also noted that the petitioner had applied to the jurisdictional Commissioner of Central Excise (Customs Policy), Chennai, for the fixation of brand rate, on 20-9-2001. The said authority had sent a communication, dated 26-11-2001, stating that the application made by the petitioner was being returned, as the imported goods had been re-exported without any process. Thereafter, the petitioner had requested for the sanctioning of drawback, u/s 74 of the Customs Act, 1962, vide letter, dated 4-12-2001. The claim made by the

petitioner, for drawback, had been rejected by the Central Excise Authorities stating that the goods exported did not undergo any manufacturing process and therefore, such goods were not eligible for brand rate of duty drawback. In such circumstances, the petitioner had requested the customs authorities, vide letters, dated 3-12-2001 and 17-12-2001, for 9000 kilograms of Metronidazole and customs duty suffered for 3500 kilograms of the goods, u/s 74 of the Customs Act, 1962.

25. It has also been noted that in case of re-export of goods imported under the DEPB scheme, the Boards Circular No. 75/2000-Cus., dated 11-9-2000, specifies certain conditions, according to which the re-export of the imported goods are allowed only if the goods are found to be unfit for use because of certain manufacturing defects. Further, the goods in question are to be re-exported within a period of six months from the date of import, and the identity of the goods has to be established to the satisfaction of the customs authorities concerned. While so, it is not in dispute that the goods had been re-exported by the petitioner, as they did not find any suitable buyer. As such, it cannot be said that the goods were defective in nature. Further, the petitioner had not adhered to the other relevant provisions of the Customs Act, 1962. As such, it is clear that the petitioner would not be eligible for drawback, u/s 74 of the Customs Act, 1962, in respect of 5000 kilograms of goods, as their batch numbers did not match with the bills of entry cited by the petitioner. Further, it is not in dispute that, at the time of re-export the goods in question, the shipping bills had to be filed, u/s 74 of the Customs Act, 1962, for drawback claim, so that all the necessary conditions and eligibility of the export, on drawback, would be verified by the customs authorities. The necessary process for verification of the eligibility criteria could not be carried out by the customs authorities concerned, due to the fact that the petitioner did not file the shipping bills, u/s 74 of the Act. Since, the shipping bills had not been filed, u/s 74 of the Act, the customs authorities concerned did not take necessary samples to test the goods. It is also seen, from the shipping bills, invoices, packing list and the examination report, that the fact of export of imported goods had not been declared by the petitioner and the shipping bills had not been filed, u/s 74 of the Customs Act, 1962. In such circumstances, this Court is of the considered view that the petitioner is not entitled to the reliefs prayed for in the present writ petition. Hence, the writ petition stands dismissed. No costs. Connected M.P. No. 1 of 2011 is closed.