(2009) 02 MAD CK 0041

In the Madras High Court

Case No : Writ Petition No. 4576 of 2005

Perfetti Van Melle India Pvt. Ltd. (Formerly Van Melle Confectionery India Private Limited) APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 09-02-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 128, 129DD, 74, 76
Standards of Weights and Measures (Packaged Commodities) Rules, 1977 — Rule 33

Citation : (2009) 243 ELT 654

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : S. Ignatius, for Muizz Ali, for the Appellant; S. Govindarajan, ACGSC, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Petitioner seeks Writ of Certiorarified Mandamus to quash the impugned order dated 29.10.2004 and direct the 1st

Respondent and other officers to refund a sum of Rs. 23,53,275.96 in terms of Section 74 of Customs Act on the 5 consignments of confectionery

re-exported by the Petitioner.

2. Facts in brief is that M/s. Perfetti Van Melle India Pvt. Ltd., Chennai had re-exported confectionery under 18 shipping bills. The exporter had

claimed drawback amount of Rs. 63,84,097/- u/s 74 of Customs Act, 1962. Case of the Petitioner is that goods were re-exported due to the

reason that the super confectionery were not able to withstand the Indian climatic conditions and at the time of export, the Officers who examined

the cargo have opined that the identity of the goods cannot be established or the market value was less than the drawback claimed in respect of 5

shipping bills and identity was established but market value less than the drawback claimed in respect of remaining 13 shipping bills. After hearing,

by the order dated 23.4.2003, the Asst. Commissioner of Customs (DBK) rejected the supplementary claims for all the 18 shipping bills as

inadmissible.

3. Aggrieved by the above order, Writ Petitioner fled appeal before the 2nd Respondent/Commissioner of Customs u/s 128 of Customs Act. In

respect of 13 consignments, 2nd Respondent held that the identity of the case were established and the market value was higher than the

drawback claimed. 2nd Respondent also held that Petitioner produced evidence that the foreign exchange was realised and the goods exported to

the foreign country were sold in their country. Insofar as, 5 consignments, 2nd Respondent held that the identity of the goods had not been

established under the respective Bills of Entry and that the goods re-exported have market value more than the drawback claimed. As such the

order of lower authority was modified to the extent that the drawback was allowed for 13 shipping bills where identity has been established and

also where the market price is more than the drawback claimed and in respect of 5 shipping bills, the rejection of drawback claim for not

establishing the identity is upheld.

4. As against the order of 2nd Respondent, Petitioner preferred Revision before the 1st Respondent - Union of India. Confirming the order of 2nd

Respondent, 1st Respondent dismissed the Revision preferred u/s 129DD of Customs Act. The impugned order rejecting drawback of 5 shipping

bills was upheld by the 1st Respondent.

5. Opposing the Petition, Respondents have filed counter stating that in respect of 5 shipping bills, the examination report reveals that the identity of

the goods has not been established with reference to the import Bill of Entry and the goods have no market value based on the condition of the

goods. According to the Respondents, the lower authority recorded that the exporter has accepted the fact of non-marketability of the goods in

India. According to the Respondents, since the identity of the goods is the prime criteria for claims of drawback u/s 74 of Customs Act, the

Commissioner (Appeals) and the Ministry have rightly rejected the drawback claims in the remaining 5 cases.

6. Mr. S. Ignatius, learned Counsel for the Petitioner submitted that 2nd Respondent failed to note that some evidence applicable to the other

consignments were also applicable to the balance 5 consignments and therefore, the reasons to deny the drawback in respect of balance 5 claims

was without any rational basis. Learned Counsel for the Petitioner further submitted that Petitioner produced the evidence that the goods had been

sold by the foreign supplier in their country to which it was exported and while so, there was no justification for denying drawback claim in respect

of 5 consignments when based on the same facts of drawback claims in respect of other 13 consignments which had been allowed by the 2nd

Respondent.

7. Mr. S. Govindarajan, leared Addl. Central Govt. Standing Counsel for the Respondents submitted that in respect of 5 shipping bills, identity of

the goods had not been established and the market price of the goods is not more than the drawback amount claimed because of the conditions of

the goods. It was further submitted that u/s 74 of Customs Act, identity of the goods is the prime criteria for drawback and therefore, 2nd

Respondent rightly rejected the drawback claim for the remaining 5 cases.

8. I have carefully examined the rival submissions and also the impugned orders. The drawback amount u/s 74 of Customs Act is not the

Petitioner''s absolute right. Mere permitting to export will not lead to grant of drawback amount and it is admissible only subject to the fulfillment of

all conditions u/s 74 of the Act, to the satisfaction and compliance of laws of the Government.

9. Section 74 comes into operation when the Articles which are imported or re-exported and such Articles are easily identifiable. For claiming

drawback u/s 74, the following are the requirements:- (i) The goods on which drawback is claimed must be imported earlier; (ii) Import duty

should have been paid when imported; (iii) Goods must be entered for re-export within two years from the date of payment of import duty. The

period of two years can be extended up to three years by the Board or by the Commissioner of Customs; (iv) Goods must be actually exported

out of India after their import; (v) Goods must be capable of being identifiable at the time of export, as the same goods which was earlier imported;

and (vi) Market price of such goods must not be less than the amount of drawback claimed.

10. Section 76(b) of Customs Act provides that no drawback amount shall be paid if the market value of the goods exported is less than the

drawback claimed. Drawback amount would be available only if the identity of the goods is established. In the impugned order, 2nd Respondent

has clearly pointed out that the identity of the goods have not been established by the Petitioner and the market price of the goods was not shown

to be more than the drawback amount claimed.

11. The goods at the time of importation contained the address of Registered Office at Mumbai of M/s. Van Melle Confectionery India Pvt. Ltd.

According to the Petitioner such printing on each pillow pack was made by the Foreign Supplier at the instance of the importer (Petitioner) as

required by Indian Law contained in Rule 33 of Standards of Weights and Measures (Pack Comm) Rules, 1977.

12. It was further submitted that the label of the Petitioner was found on the packing only for complying with the requirements of Standards of

Weights and Measures (Pack Comm) Rules, 1977. Learned Counsel would submit that Rule 33 of the aforesaid Rule clearly mandate that the

importer importing pre-packed goods intended for retail sale shall declare its name and address apart from the name and address of the

manufacturer and the retail sale price and other specifications contemplated therein. It was therefore argued that what was applicable to 13

consignments would be applicable to the remaining 5 consignments also.

13. It is not question of label - Van Melle Confectionery India Pvt. Ltd., containing registered office of the Petitioner; but it was the question of

identity. After thoroughly examining the matter, 2nd Respondent has observed that the identity of 5 consignments have not been established with

reference to the import Bill of Entry and the examination report indicated that the goods have no market value based on the condition of the goods.

14. Section 74 of the Act permits re-export of duty paid imported goods which had been capable of being easily identifiable of payment of

drawback for 98% of duty paid at the time of importation. The conditions under which such drawback are permitted is that the goods are

identified to the satisfaction of the Asst. Commissioner as those which were imported. As held by the 2nd Respondent, the goods were not

identifiable. Since identity of the goods is the prime criteria for claims of drawback amount u/s 74 of Customs Act, 2nd Respondent upheld the

rejection of drawback claim for 5 shipping bills. When the competent authority have recorded the factual finding, exercising jurisdiction under

Article 226 of Constitution, this Court cannot sit in appeal over the impugned orders.

15. The impugned orders of the Respondents 1 and 2 are assailed on the ground that the order clearly exhibits revenue bias. In support of his

contention, learned Counsel for the Petitioner placed reliance upon 2002 (145) 502 [Unichem Laboratories Ltd. v. CCE]. It was further argued

that the impugned order of the 1st Respondent is contrary to themandate of Section 74 of Customs Act. The allegations that the order of 2nd

Respondent/Commissioner (Appeals) exhibits revenue bias is devoid of substance. After thoroughly examining the report and records, 2nd

Respondent ordered payment of drawback in 13 cases and Petitioner received the drawback amount of Rs. 40,30,821/-. The authority has

pointed out that the exporter has exhibited the fact of non-marketability of the goods in India and the authorities rejected the drawback claim

mainly on the ground that the identity of the goods have not been established.

16. The 3rd Respondent/Asst. Commissioner rejected the value for drawback u/s 74 of Customs Act by holding the reason viz., that the product

became ""sticky due to climatic conditions"" has rendered it to be a scrap value. Learned Counsel would further submit that the Asst. Commissioner

rejected the drawback claim mainly on the ground that the goods were not marketable. It was further submitted that 3rd Respondent had not

recorded any finding regarding identity of the goods against which no appeal was preferred by the department. Learned Counsel would further

submit that when the Asst. Commissioner had not recorded any finding regarding identity of the goods, 2nd Respondent/Commissioner (Appeals)

ought not to have entered into the area of identity of the goods, which lower authority had not entered into. Contending that 2nd

Respondent/Appellate Authority ought not to have allowed the revenue to raise new ground, learned Counsel for the Petitioner placed reliance

upon Reckitt and Colman of India Ltd. Vs. Collector of Central Excise, and 1998

(99) ELT 188 . Placing reliance upon SACI Allied Products

Ltd., U.P. Vs. Commissioner of Central Excise, Meerut, , learned Counsel for the Petitioner would further submit that the Appellate Authority

cannot sustain case of revenue on the grounds not raised by revenue either in show cause notice or in the order. The above contention does not

merit acceptance. It may be that the 3rd Respondent/Asst. Commissioner might not have gone into the question of identity. As pointed out earlier,

for claiming the drawback amount u/s 74 of Customs Act, identity of the goods is the prime criteria. In such view of the matter, it cannot be said

that the Appellate Authority/2nd Respondent was wrong in examining the question of identity.

17. Based on the materials on record, Respondents 1 and 2 have taken consistent view that the identity of the goods in respect of 5 consignments

were not established and the same does not suffer from any illegal infirmity warranting interference.

18. In the result, the Writ Petition is dismissed. No costs.