

(2016) 05 GUJ CK 0033
In the Gujarat High Court

Case No : Special Civil Application No. 8025 of 2015 with SCA No. 2753 of 2016

Ratnamani Metals And Tubes Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 06-05-2016

Acts Referred:

Citation : (2016) 339 ELT 509

Hon'ble Judges : Akil Kureshi and A.Y. Kogje, JJ.

Bench : Division Bench

Advocate : S/Shri Paresh M. Dave with Paritosh Gupta, J.C. Patel and Dhaval Shah, Advocates, for the Petitioners; S/Shri Devang Vyas, Y.N. Ravani and Ms. Maithili D. Mehta, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Akil Kureshi, J. (Oral)—In these petitions, facts somewhat differ. However, legal controversy being common, we have heard them together. We may notice facts from each petition.

2. In Special Civil Application No. 8025/2015, the petitioner has challenged an order dated 9-10-2014 [2015 (320) E.L.T. 684 (G.O.I.)] by which the Government of India allowed the revision petition of the department and set aside the order of Commissioner (Appeals) dated 11-7-2013. The petitioner is in the business of manufacturing goods which are exported by the petitioner. For the purpose of the manufacturing activity, the petitioner imports various inputs and raw materials. The petitioner imported various items such as polyethylene, adhesive epoxy, etc. by paying customs duty utilising Duty Entitlement Pass Book Scrip ("DEPB scrip" for short) which the petitioner had purchased from the market. While exporting the final product manufactured with the aid of such imported inputs, the petitioner desired to avail duty drawback. For such purpose, the petitioner applied for determination of brand rate of drawback in terms of Rule 6 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 (hereinafter referred to as "the Rules of 1995"). The Additional

Commissioner of Customs rejected said application by an order dated 19-4-2013 on the ground that the duty was not paid in cash but through DEPB scrip. According to him, the imports made under DEPB scheme are exempt from payment of customs duty and that therefore, it cannot be stated that the imports had suffered customs duty. The petitioner challenged the order of competent authority before the Commissioner (Appeals), who by his order dated 11-7-2013 allowed the appeal. He referred to the Board Circular No. 41/2005, dated 28-10-2005 and observed that in the said circular, it is clarified that additional customs duty paid through debit in DEPB is allowed as brand rate of duty drawback. He made the following observations :

"8.1 On the other hand on going through the para 10 to 12 reproduced above, on the ground that the element of CVD and 4% special CVD are eligible for fixation of brand rate however, element of Basic Customs duty, debited through the DEPB scrip is not eligible for drawback. The lower adjudicating authority has held in this regard that,

"??. I find that as discussed herein above, I find that as discussed herein above, (sic) one exception has been made by the Government in case of CVD and special CVD and for that provisions are made in the notifications itself, as well as clarifications are issued. However, no such clarification is issued with regard to Basic Customs Duty. Therefore, if the intention of the Government was to allow drawback of that portion of BCD which was debited through DEPB scrip, the Government must have issued some clarification. Since there is no such clarification, it is clear that the intention of the Government is not to grant drawback of that portion of BCD which is debited in DEPB, by treating as exempted fully."

8.2 The appellant has on the other hand contended that no tax or duty, in any form, should be exported out of the country and therefore the basic customs duty paid through debittal of DEPB scrip should be eligible for the brand rate of drawback. In this regard I find that the instant contention of the appellant is acceptable. Just because no clarification has been issued for getting drawback in respect of basic customs duty it does not mean that the brand rate of the drawback is not available in respect of basic customs duty. Clarifications are warranted when there is ambiguity. Excepting non availability of clarification from the Board, New Delhi, in respect of the basic customs, duty, the lower adjudicating authority has not pointed out as to how and under which provisions of the law the same is not required to be granted."

3. The department challenged the order of Commissioner (Appeals) before the Government by filing the revision petition. The revision petition was allowed by impugned order dated 9-10-2014. Reference was made to the Notification No. 97/2009, dated 11-9-2009 which provided that an importer shall be entitled to avail the drawback or Cenvat credit of additional duty leviable under Section 3 of the Customs Tariff Act against the amount debited in the DEPB scrip. This clarification was interpreted as to limiting the benefit of drawback only on

additional duty leviable under Section 3 of the Customs Tariff Act and not to cover the drawback on basic customs duty when debited in the DEPB. This order the petitioner has challenged in this petition.

4. In Special Civil Application No. 2753/2016, the petitioner has challenged an order dated 28-12-2015 by which the Commissioner (Appeals) dismissed the appeal of the petitioner and held that the petitioner would not be entitled to duty drawback. This issue arose in the background of the fact that the petitioner is an exporter of Acyclic Amide and avails of various schemes such as Vishesh Krishi and Gram Udyog Yojana ("VKGUY" for short), Focus Market Scheme ("FMS" for short) and Focus Product Scheme ("FPS" for short) under which certain incentives have been granted by the Government of India on the exports made by the exporter. In this case also, the question relates to availability of duty drawback where the basic customs duty has been paid through the credited incentive in the MLFPS scheme. Here also, the Government of India contends that the duty drawback is not available unless the customs duty is paid in cash and not through debit in the scrip.

5. In the background of such facts, learned advocates appearing for the petitioners contended that the approach of the Government of India is wholly erroneous. The duty drawback is provided where customs paid inputs are used for export of final product and is governed by statutory provisions and regulations made by the Government of India. There is no limitation on drawback being available when the customs duty is suffered through surrendering credit in the scheme, be it DPEB or MLFPS. In either case, it cannot be stated that the customs duty is not paid. Our attention was drawn to Rule 3 of the Rules of 1995 which provides for benefits of the drawback, subject to conditions laid down therein, at specified rates. It was argued that there is no restriction on availability of drawback when the duty is paid through debit in DEPB scrip. The reliance of the authorities on the clarification about availability of drawback on additional customs duty paid through DEPB, cannot be utilised to deny the benefit of drawback when the question of basic customs duty arises.

6. On the other hand, learned counsel Shri Ravani and Shri Bhatt for the department opposed the petitions contending that the claim of drawback of an exporter must be examined within the statutory provisions and Government of India notifications and the policy, which do not permit drawback on imports made under DEPB and other similar export incentive schemes. In case of imports made under DEPB scheme, the customs duty is exempted. Goods therefore, not having suffered the customs duty, upon export of the final product, drawback would not be available. Our attention was drawn to the decision of Division Bench of this Court in case of Gujarat Ambuja Exports Ltd. v. Government of India reported in 2013 (289) E.L.T. 273 (Guj.), in which in the context of charge-ability of education cess, this Court had examined the provisions contained in DEPB scheme. Reliance was also placed on the Government of India Circular No. 3/99, dated 3-2-1999 in which it was clarified that brand rate of drawback is admissible

only against cash payment of duties and debit of duties under DEPB scheme on import of goods being in the nature of avilment of exemption of duty under the Customs Act, drawback would not be available.

7. The short question therefore, that calls for consideration is whether when an importer utilises DEPB scrip for the purpose of customs duty on inputs and raw materials, benefit of duty drawback would be available upon export of the final product?

8. Section 75 of the Customs Act pertains to drawback on imported materials used in the manufacture of goods which are exported. As per subsection (1) of Section 75, where it appears to the Central Government that in respect of goods of any class or description, manufactured, processed or on which any operation has been carried out in India, a drawback should be allowed of duties of customs on any imported materials of a class or description, the Central Government may by issuing a notification in the official gazette, direct that drawback shall be allowed in respect of such goods in accordance with and subject to the rules made under subsection (2). Under subsection (2) of Section 75, the Central Government is authorised to make rules for the purpose of carrying out the provisions of subsection (1). In exercise of such powers, the Central Government has notified the Rules of 1995. Clause (a) of Rule 2 defines term "drawback" as in relation to goods manufactured in India and exported, the rebate of duty or tax as the case may be, chargeable on imported materials or excisable materials used or taxable services used as input services in the manufacture of such goods. Rule (3) of the Rules of 1995 pertain to drawback, relevant portion of which reads as under :

"RULE 3. Drawback. (1) Subject to the provisions of

(a) the Customs Act, 1962 (52 of 1962) and the rules made thereunder,

(b) the Central Excises and Salt Act, 1944 (1 of 1944) and the rules made thereunder,

[(bb) the Finance Act, 1994 (32 of 1994), and the rules made thereunder, and]

(c) these rules,

a drawback may be allowed on the export of goods at such amount, or at such rates, as may be determined by the Central Government :

[Provided that where any goods are produced or manufactured from imported materials or excisable materials or by using any taxable services as input services, on some of which only the duty or tax chargeable thereon has been paid and not on the rest, or only a part of the duty or tax chargeable has been paid, or the duty or tax paid has been rebated or refunded in whole or in part or given as credit, under any of the provisions of the Customs Act, 1962 (52 of 1962) and the rules made thereunder, or of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, or of the Finance Act, 1994 (32 of 1994)

and the rules made thereunder, the drawback admissible on the said goods shall be reduced taking into account the lesser duty or tax paid or the rebate, refund or credit obtained :]

Provided further that no drawback shall be allowed

(i) if the said goods, except tea chests used as packing material for export of blended tea, have been taken into use after manufacture;

(ii) if the said goods are produced or manufactured, using imported materials or excisable materials or taxable services in respect of which duties or taxes have not been paid; or]

(iii) on jute batching oil used in the manufacture of export goods, namely jute (including Bimplipatam jute or mesta fibre) yarn, twist, twine, thread, cords and ropes;

(iv) If the said goods, being packing materials have been used in or in relation to the export of

(1) jute yarn (including Bimplipatam jute or mesta fibre), twist, twine, thread and ropes in which jute yarn predominates in weight;

(2) jute fabrics (including Bimplipatam jute or mesta fibre), in which jute predominates in weight;

(3) jute manufactures note elsewhere specified (including Bimplipatam jute or mesta fibre) in which jute predominates in weight.

[(v) on any of the goods [falling within heading 0401, 0402, 0403, 0404, 0406, 1006 or 3501] of First Schedule to the Customs Tariff Act, 1975 (51 of 1975)]"

9. Rule 6 of the said Rules of 1995, pertains to cases where amount of rate of drawback has not been determined. Under subrule (1) of Rule 6, where no amount of rate of drawback has been determined in respect of any goods, the manufacturer or exporter of such goods may apply for determination of amount or rate of drawback.

10. In exercise of powers under subsection (2) of Section 75 and other related statutes, the Government of India has issued Notification No. 92/2012, dated 4-10-2012 providing the rate of drawback as specified in the schedule to the said notification. Clause (8) of this notification provides that the rates of drawback specified in the schedule to the said notification, shall not be applicable to export of a commodity or product which falls in any one of the five categories specified therein. This clause reads as under :

"(8) The rates of drawback specified in the said Schedule shall not be applicable to export of a commodity or product if such commodity or product is

(a) manufactured partly or wholly in a warehouse under section 65 of the Customs Act, 1962 (52 of 1962);

(b) manufactured or exported in discharge of export obligation against an Advance Licence or Advance Authorisation or Duty Free Import Authorisation issued under the Duty Exemption Scheme of the relevant Export and Import Policy or the Foreign Trade Policy :

Provided that where exports are made against Advance Licences issued on or after the 1st April, 1997, in discharge of export obligations in terms of notification No. 31/97Customs, dated the 1st April, 1997, or against Duty Free Replenishment Certificate Licence issued in terms of notification No. 48/2000Customs, dated the 25th April, 2000, or against Duty Free Replenishment Certificate Licence issued in terms of notification No. 46/2002Customs, dated the 22nd April, 2002, or against Duty Free Replenishment Certificate Licence issued in terms of notification No. 90/2004Customs, dated the 10th September, 2004, drawback at the rate equivalent to Central Excise allocation of rate of drawback specified in the said Schedule shall be admissible subject to the conditions specified therein;

(c) manufactured or exported by a unit licensed as hundred per cent. Export Oriented Unit in terms of the provisions of the relevant Export and Import Policy and the Foreign Trade Policy;

(d) manufactured or exported by any of the units situated in free trade zones or export processing zones or special economic zones;

(e) manufactured or exported availing the benefit of the relevant Export and Import Policy and the Foreign Trade Policy;"

11. We may also refer to the Board Circular No. 41/2005, dated 28-10-2005 since much debate on this circular has taken place in the orders passed by the authorities. The relevant portion of the said circular reads as under :

"Subject : Eligibility of brand rate of duty drawback where inputs used in the manufacture of export products are imported availing of DEPB Clarification Regarding.

The undersigned is directed to invite your attention on the above mentioned subject and to state that an issue has been raised as to whether additional customs duty paid through debit under DEPB can be allowed as brand rate of duty drawback.

2. The matter has been examined by the Board. Hitherto, the additional customs duty paid in cash only was adjusted as CENVAT credit or duty drawback while the same paid through debit under DEPB was not allowed as duty drawback. In the Foreign Trade Policy, 2004-2009, which came into force w.e.f. 192004, it has been provided under Paragraph 4.3.5 that the additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as CENVAT credit or Duty Drawback as per the rules framed by the Department of Revenue. Taking note of this change, it has been decided that the additional customs duty paid through debit under DEPB shall also be allowed as brand rate of duty

drawback.

3. Accordingly the instructions contained in Circular No. 3/99Cus., dated 321999 stand modified.

12. A similar clarification came to be issued under Circular No. 26/2007, dated 20-7-2007 in which it was provided as under :

"3. In brief, the issue involved is, whether the duty paid through debits under DEPB is to be treated as payment of duty or exemption from duty. Hitherto, the stand taken by the department was that goods cleared through debit under DEPB are exempted goods and, accordingly, no CENVAT or drawback was allowed for such payments. Para 4.3.5 of the Foreign Trade Policy, 200409 was amended allowing, additional Customs duty paid through debit under DEPB to be adjusted as Cenvat credit or duty drawback. The said position was clarified vide Circular No. 59/2004Cus., dated 21-10-2004 [2004 (173) E.L.T. T9]. It implies that the goods cleared by debits through DEPBs are not to be treated as exempted but duty paid.

4. Section 61 of the Customs Act, 1962 provides for charging of interest on duty payable on clearance of warehoused goods. Section 61(2)(i) and (ii) provides that the interest shall be payable on the amount of duty payable at the time of the clearance of the goods from the warehouse. In case of clearances under DEPB Scheme, the amount of duty payable is required to be debited from DEPB scrip. Therefore, it cannot be considered that the duty payable is nil or exempted. This is further supported by the fact that the CENVAT credit or duty drawback is available even when the additional Customs duty is debited under DEPB."

13. It can thus be seen that the benefit of duty drawback is available in terms of Section 75 of the Customs Act, 1962 as provided in the Drawback Rules as specified by Government notifications from time to time. Section 75 in plain terms enables the Government of India to issue notification allowing drawback of the duty on export of goods or inputs utilised for manufacture of export goods. The drawback would be relatable to duty of customs chargeable under the Act on such imported materials.

14. As noted, in exercise of powers under sub-section (2) of Section 75, the Drawback Rules of 1995 have been framed. In terms of Rule 3 of the said Rules of 1995, drawback is allowed on export of goods at such rates as may be determined by the Central Government. Under further proviso to Rule 3 however, such drawback would not be available in various categories specified therein. None of these categories include the payment of customs duty on the goods through DEPB scrip. In other words, Rule 3 does not prohibit a claim of drawback as per the specified rates if the duty on the imported goods is not paid in cash but by surrendering credit in the DEPB scrip. Thus neither Section 75 of the Customs Act, nor Rule 3 of the Rules of 1995, provide any restriction on claim of drawback, if the basic duty of customs is paid through DEPB.

15. In order to appreciate the department's concern about the customs duty not being paid when the import is made under DEPB scheme, we may broadly refer to the DEPB scheme. The scheme is framed under the importexport policy and is one of the many duty exemption or remission schemes. The scheme provides that objective of DEPB is to neutralise incidence of customs duty on import component of export product which would include special additional duty in case of nonavailability of Cenvat credit. Neutralisation would be provided by way of grant of duty credit against export product which would be at a specified percentage of FOB value of export. The holder of DEPB would have an option to pay additional customs duty in cash also. DEPB is freely transferable. The Foreign Trade Policy of 20092014 contained an additional clause which hitherto was not a part of the policy and reads as under :

"Applicability of Drawback.

Additional customs duty/Excise Duty and Special Additional Duty paid in cash or through debit under DEPB may also be adjusted as CENVAT Credit or Duty Drawback as per DOR rules."

16. It can thus be seen that the DEPB scheme aims at neutralising the incidence of customs duty on import component of export product, where upon export, credit would be given at specified rate on the FOB value of the exports. Such credit could be utilised for payment of duty in future or may even be traded. It was in this background that Supreme Court in case of *Liberty India v. Commissioner of Incometax* reported in 317 ITR 218, had held that DEPB being an incentive which flows from the scheme framed by the Central Government, hence, incentives profits are not profit derived from the eligible business (in the said case falling under Section 80IB of the Income Tax Act) and belong to the category of ancillary profits of the undertaking. Such incentive in the nature of DEPB benefit from the angle of the income tax has been seen as income of the undertaking. Thus when an importer whether imports goods under DEPB scheme or pays customs duty on the imports on purchased DEPB credits, he essentially pays customs duty by adjustment of the credit in the passbook. It would therefore, be incorrect to state that the imports made in such fashion have not suffered the customs duty.

17. As noted, neither Section 75 nor the Rules of 1995, prohibits entitlement of drawback when the basic customs duty has been paid through DEPB scrip. To read such limitation through the clarification issued by the Government of India in various circulars which principally touch the question of eligibility of draw back, when additional duties have been paid through DEPB would not be the correct interpretative process.

18. We may recall, in the circular dated 28-10-2005 it was clarified that hitherto additional customs duty paid in cash only was adjusted as Cenvat credit or duty drawback and the same paid through debit under DEPB was not allowed as duty drawback. However, with effect from 1-9-2004, Foreign Trade Policy provided

that additional customs duty/excise duty paid in cash or through debit under DEPB shall be adjusted as Cenvat credit or duty drawback as per the rules. It was in this background provided that additional customs duty paid through debit under DEPB shall also be allowed as brand rate of duty drawback. Thus, the Foreign Trade Policy removed restrictions on additional customs duty being adjusted against Cenvat credit or duty drawback, unless paid in cash. A corresponding clarification was issued. This clarification cannot be seen in reverse as to eliminate the facility of draw back when basic customs duty has been paid through DEPB scrip.

19. The case of imports under different other schemes substantially stand on the same footing. Though as is bound to be, terms of each scheme are different. In case of VKGUY, the foreign policy provides for incentive with the objective to compensate high transport costs and offset other disadvantages to promote exports of various products specified therein which include the agricultural produce, minor forest produce, Gram Udyog products, forest based products etc. In case of such exports, the incentive is made available in form of duty credit scrip at the rate of 5% of the FOB value of the exports. Likewise, in case of FMS, it is provided that same is to offset high freight cost and other externalities to select international markets to enhance India's export competitiveness in these markets. Specified product exported to specified countries qualify for such benefits. Duty credit scrip at the specified rate of the FOB value of the exports would be provided. In case of FPS, the objective is to promote export of products which have high export intensity/employment potential so as to offset infrastructural inefficiencies and other associated costs involved in marketing of these products. In this scheme also, exports qualify for duty credit scrip at the rate of 2% or 5% of the FOB value as provided in the notification. It can thus be seen that in all these cases, for different reasons the Government of India provides export incentives at specified rates of the value of the exports. The intention is to make the exports viable, more competitive and to neutralise certain inherent handicap faced by the industry in the specified areas. These export incentive schemes have nothing to do with offset of duty element of imported raw materials or inputs used in export products, unlike as in the case of DEPB.

20. Thus, under these schemes, the Government of India having realised that exports in question require added incentive, provides for the same in form of credit at specified rate of FOB value of the export which credit can be utilised for payment of customs duty. To disqualify such payment for the purpose of duty drawback would indirectly amount to denying the benefit of the export incentive scheme itself.

21. Judgement of this Court in case of Gujarat Ambuja Exports Ltd. (supra), was rendered in different background. The question there was charge-ability of education cess which was calculated at the rate of 2% on the aggregate of duty of customs levied and collected by the Central Government. In this background,

question arose where the imports are made under DEPB scheme, would education cess be applicable. Noticing that subject to adjustment in DEPB scrip, the imports are made exempt from payment of duty, it was held that there cannot be education cess on such imports. The issue in the present case is vastly different.

22. Likewise, the decision of learned Single Judge of Madras High Court relied upon by the counsel for the Revenue in case of Associated Autotex Ancillaries P. Ltd. v. Joint Secretary, MF reported in 2007 (211) E.L.T. 368 (Mad.), did not concern the present controversy. In the said case, it was held that modification by circular dated 28-10-2005 would be prospective and the clarification of brand rate of duty drawback would be available also in relation to additional customs duty paid through DEPB, would have no retrospective effect.

23. In the result, both the petitions are allowed. Impugned orders are reversed. Proceedings are placed back before the original authority for fixation of brand rate of duty in each case. Petitions are disposed of.