
(2008) 11 MAD CK 0106
In the Madras High Court
Case No : Writ Petition No. 205 of 2003

Saraf Trading Corporation

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 20-11-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 117, 124, 142, 147, 28AA

Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 12, 16

Citation : (2008) 11 MAD CK 0106

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : Hari Radhakrishnan, for the Appellant; T.S. Rajamohan, for the Respondent

Final Decision : Dismissed

Judgement

M. Jaichandren, J.—Heard the learned Counsel appearing for the petitioner and the learned Counsel appearing for the respondents.

2. This writ petition has been filed praying for a writ of Certiorarified Mandamus, to call for the records relating to the show cause notices, dated 25.11.2002 and 22.11.2002, quash the same and to direct the first and second respondents to treat the draw back allowed for the exports effected under the shipping bills, covered under the impugned show cause notices, as the rebate under the Central Excise Act, 1944.

3. It has been stated that the petitioner firm is engaged in trading and export of tea to various countries. The petitioner firm had exported tea, vide two shipping bills, dated 21.6.2000, relating to a quantity of 42,003 kilograms of tea and vide 43 shipping bills, during the period from 10.7.2000 to 27.4.2001, relating to a quantity of 9,30,425 kilograms and claimed drawback at the rate of Rs. 2/- per kilogram of tea exported. The drawback was sanctioned, on 18.7.2000, for 42,003 kilograms and on 31.5.2002, for a quantity of 8,06,425 kilograms and,

on 18.7.2002, for the remaining quantity of 1,24,000 kilograms of tea, by the Assistant Commissioner of Customs Drawback, Customs House, Tuticorin, the fourth respondent herein.

4. While so, the petitioner firm had been issued with two show cause notices bearing No. C. No. VIII/22/8/2002-DBK, dated 25.11.2002, and No. C. No. VIII/22/8/2002-DBK, dated 22.11.2002, calling upon the petitioner firm to show cause as to why the amount of drawback to the tune of Rs. 84,006/- and Rs. 25,54,375/-, respectively, should not be recovered, under Rule 16 of the Customs and Central Excise Duty (Drawback) Rules, 1995. It has been stated that the show cause notices had been issued due to the reason that there was no rate of drawback in the Schedule appended to the Customs and Central Excise Duty (Drawback) Rules, 1995, effective from 1.6.2000. Since the drawback had been allowed to the petitioner firm the show cause notices have also proposed to recover the interest on the said amount of drawback and also to impose a penalty, u/s 117 of the Customs Act, 1962.

5. It has also been stated that the impugned show cause notices would result in substantial monetary loss to the petitioner firm if the amount of drawback allowed in favour of the petitioner firm is recovered and if the interest and penalty is imposed on the petitioner firm, as proposed in the show cause notices. Further, it would defeat the policy of the Government to provide export incentives for enhancing the exports from India. In such circumstances, the writ petitioner has preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

6. In the counter affidavit filed on behalf of the respondents it has been stated that the petitioner firm, which is a regular exporter of tea, had exported 1,27,71,487.5/- kilograms of 'Pure Black Indian Tea' under 72 Computer Shipping Bills (EDI System) through the Custom House, Tuticorin, during the period from 10.7.2000 to 27.4.2001, and it had availed a drawback amount of Rs. 25,54,375/- at Rs. 2/- per kilogram and similarly, vide Shipping Bill Nos. 1009355 and 1009356, dated 21.6.2000, the petitioner firm had exported a quantity of 42,003 kilograms of tea and availed a drawback amount of Rs. 84,006/-. The amount was paid for 65 drawback claims, on 31.5.2002, and for 7 claims, on 12.7.2002, for a total amount of Rs. 25,54,375/-. As per the duty drawback schedule for the year 2000-2001 (June to May), there was no specific rate of draw back fixed for 'Pure Black Indian Tea', under Serial No. 09.21 of the Table from 1.6.2000. Therefore, the tea that had been exported by the petitioner firm was not eligible for the drawback since 1.6.2000. The petitioner firm had filed EDI Drawback Shipping Bills and mis-declared the commodity under Serial No. 09.21 and had wrongly availed the drawback benefits. Hence, the show cause notices were issued demanding the drawback amount, which had been erroneously paid to the petitioner firm.

7. It has been further stated that Section 142 of the Customs Act, 1962, provides for the collection of the duty short-paid, short-levied and erroneously refunded.

Hence, the petitioner's contention that the authorities were also not aware of the fact that the petitioner was not eligible for drawback after 1.6.2000 and hence, the drawback given to the petitioner firm should not be demanded, is contrary to Section 142 of the Customs Act, 1962. In fact, the petitioner firm had admitted that it is not eligible for the drawback after 1.6.2000, after the amendment had been made to the drawback schedule. The petitioner firm which had made a claim for drawback, erroneously, cannot raise the plea that the respondents should be estopped from demanding the drawback amount.

8. It has been further stated that the Assistant Commissioner of Customs is competent to revise the decision taken on an earlier drawback claim and to entertain the supplementary claim filed and also to issue a demand to recover the amount of drawback paid erroneously, as held in *Collector v. India Steel Industries* 1993 (67) ELT 760 (GOI). Further, the interest on delayed return of drawback erroneously paid, as per Section 75(a)(2) of the Customs Act, 1962, read with Section 28AA, where any drawback has been paid to the claimant, erroneously, the claimant shall, on demand, pay the said amount, within two months, failing which he shall also be liable to pay interest at the rate of 15% per annum beyond the period of two months till the date of recovery of such amount, vide Notification No. 26/2002-Cus (NT), dated 13.5.2002, issued u/s 28AA of the Customs Act, 1962.

9. It has been further stated that, with regard to the request of the petitioner regarding the rebate of duty for export of goods under Central Excise, it is stated that the rebate is given by the central Excise Department for the duties suffered on the materials used for the manufacture of the exported goods. Regarding the eligibility for rebate, the petitioner firm has to approach the Central Excise Authorities for relief and remedial measures, whereas the draw back is sanctioned by the customs authorities. The petitioner firm has to follow the procedures for availing the rebate, as prescribed by the Board for export of tea, vide Part VI of Board's Letter No. 129/40/95-Cx, dated 29.5.95. The petitioner firm is to disclose details like the period of purchase and the source from which the tea had been purchased for claiming rebate under Central excise. By virtue of Notification No. 6/2000-C.Ex, dated 1.3.2000, the effective rate of duty for Tea falling under Chapter sub-Heading 09.02 was 'Nil' from 1.4.2000. Further, Notification No. 41/26.11.1999 exempts tea from levy of Central Excise Duty, if cleared by a factory belonging to a Co-operative Society and by a bought leaf factory, subject to certain conditions. Further, the petitioner would be eligible for rebate only if the tea exported had suffered duty and the petitioner would not be eligible for such rebate if 'tea' had been exempted from duty during the year in which the shipment had taken place. In such circumstances, the writ petition is liable to be dismissed as devoid of merits.

10. The main contentions of the learned Counsel appearing on behalf of the petitioner are that the petitioner firm had made the drawback claims without having any intention to mislead or to misrepresent the matter. The drawback

made by the petitioner firm had been sanctioned by the concerned customs authorities. However, the impugned show cause notices have been issued after a substantial delay, which is not due to the fault of the petitioner firm. Since the petitioner firm is not responsible for the sanctioning of the drawback amounts by the customs authorities concerned, the drawback amounts already paid, should not be recovered under Rule 16 of Customs and Central Excise Duty (Drawback) Rules, 1995, read with Section 142 of the Customs Act, 1962. Further, the petitioner firm would not be liable to pay any penalty for the alleged contravention of Section 147 of the Customs Act, 1962, read with Rule 12 of the Customs and Central Excise Duty (Drawback) Rules, 1995.

11. The learned Counsel appearing on behalf of the petitioner firm had also submitted that the petitioner firm is entitled to claim rebate for the tea exported from the Central Excise authorities, even if the petitioner firm is not eligible for the drawback amount. The learned Counsel for the petitioner had relied on the decision of the Supreme Court reported in *Formica India Division Vs. Collector of Central Excise and Others*, and a Division Bench of this Court in *Commissioner of Central Excise Vs. Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench and Elgi Ultra Industries Limited*, in support of his contentions. The learned Counsel had also relied on a circular issued by the Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, Government of India, in Circular No. 489/55/99-CX, dated 13.10.99, to show that the 'tea' exported by the petitioner firm is eligible for rebate of excise duty.

12. The learned Counsel had also submitted that if the petitioner firm approaches the concerned authorities of the Central Excise Department for rebate on the tea exported by the petitioner firm, the claim could be rejected on the ground of delay. Since the Central Board of Excise and Customs is also shown as a respondent in the present writ petition, this Court may be pleased to issue a direction to the said Board to entertain the claim of the petitioner firm for rebate on the tea exported by it, even if it is found that the petitioner firm is not entitled to the drawback amounts already allowed in favour of the petitioner firm.

13. The learned Counsel appearing on behalf of the respondents had submitted that the petitioner firm is not eligible for the drawback amount availed by the petitioner firm for the tea exported by it, since it had mis-declared the commodity under Sl. No. 09.21 to avail the drawback benefits and even though there was no specific rate of draw back fixed for 'Pure Black Indian Tea' under Sl. No. 09.21 of the table from 1.6.2000.

14. It was further stated that u/s 142 of the Customs Act, 1962, the collection of the duty short-paid, short-levied and erroneously refunded could be made. Further, if there is a delay in repaying the amount, interest and penalty could also be levied on the person or firm, which had wrongly availed the drawback benefits. Further, the petitioner firm had only challenged the show cause notices issued to it from the office of the Commissioner of Customs, Customs House, Tuticorin, issued u/s 124 of the Customs Act, 1962. Therefore, it is always open

to the petitioner firm to show cause, as required under the impugned notices, along with the necessary documents, while putting forth its case. With regard to the claim or rebate from the Central Excise authorities, it is for the petitioner firm to approach the concerned authorities for claiming rebate for the tea exported by it by showing its eligibility. Since the writ petition is devoid of merits, it is liable to be dismissed.

15. In view of the averments made on behalf of the petitioner, as well as the respondents and in view of the submissions made by the learned Counsels appearing on behalf of the parties concerned and on a perusal of the records available, this Court is of the considered that the petitioner has not shown sufficient cause or reason to interfere with the impugned notices, dated 25.11.2002 and 22.11.2002. Further, this Court does not find it appropriate to direct the concerned respondents to entertain the request of the petitioner firm for rebate under the Central Excise for the tea said to have been exported. Since the petitioner firm has challenged only the show cause notices, issued u/s 124 of the Customs Act, 1962, this Court is not inclined to quash the same, at this stage. If the petitioner firm could show that it is eligible for the drawback benefits for the tea exported, the authorities concerned would consider the same and pass appropriate orders thereon. However, if it is found that the petitioner firm is not eligible for the drawback benefits, it would have to repay the amount availed by it as drawback amount. With regard to the claim of the petitioner firm for rebate from the Central Excise Authorities this Court is not persuaded to direct the concerned respondents to entertain the claim of the petitioner firm for such rebate. However, it is observed that it is open to the petitioner to approach the appropriate authorities to claim for the rebate from the concerned Central Excise authorities. It goes without saying that the appropriate authorities would decide the issue, on merits and in accordance with law.

16. While dismissing the above writ petition, it is observed that the petitioner firm is permitted to file its objections to the impugned show cause notices to the fourth respondent, within 15 days from the date of receipt of a copy of this order and on receipt of the objections the fourth respondent is directed to pass appropriate order thereon, on merits and in accordance with law, within a period of eight weeks thereafter. The writ petition stands dismissed with the observations and directions as stated above. No costs.