(2016) 05 SC CK 0066

In the Supreme Court Of India

Case No : Civil Appeal No. 1612 of 2007

Shell Exports (Kandla) APPELLANT

Vs

Union of India and Anr. RESPONDENT

Date of Decision : 04-05-2016

Acts Referred:
Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2016) 336 ELT 10 : (2016) 12 SCC 641

Hon'ble Judges : A.K. Sikri;R.K. Agrawal, JJ.

Bench : Division Bench

Advocate : R. Balasubramanian, Ms. Kiran Bhardwaj, Pranav Kumar, Santosh Kumar, M.K. Maroria, Ms. Kiran Bhardwaj, C.K. Makker, V.K. Verma, Advocates, for the Respondent

Final Decision : Allowed

Judgement

A.K. Sikri, J. - This appeal, filed by the appellant-assessee, challenges the correctness of orders dated 03.11.2004 passed by the High Court of Gujarat in Special Civil Application No. 11755 of 2003. By the said judgment, the High Court has dismissed the writ petition which was filed by the appellant herein claiming the benefit under Notification No. 07/2002-2007 dated 05.06.2002. Obviously, with the dismissal of the writ petition, the benefit has been denied by the High Court.

2. To recapitulate the factual matrix in brief, the Government of India had come out with Export and Import Policy 2002-2007 (hereinafter referred to as ''EXIM Policy'') which was promulgated under Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as ''Act''). It is not in dispute that this Policy is statutory in nature. The Act also empowers the Central Government to amend, modify or rescind such policy. Exercising this power which is conferred by Section 5 of the said Act, Notification No. 7/2002-2007 dated 05.06.2002 was issued amending/correcting the EXIM Policy. By this Notification, amendments were made to paragraph 7.9 of the EXIM Policy.

Since it is the interpretation of this Notification which is called in question, it would be useful to reproduce the said Notification in its entirety. It reads as under:

"In exercise of powers conferred by Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 (No.22 of 1992) read with paragraph 1.1 of the Export and Import Policy, 2002-07, the Central Government hereby amends/ corrects the Export and Import Policy, 2002-07 as under:

1) A new sub para {numbered as (iii)} shall be added to paragraph 7.9(I). The text of the new sub paragraph would be: -

(iv) Benefit of DEPB in lieu of Drawback for supplies made to SEZ or unit in SEZ.

Accordingly the amended para 7.9(a)(1) would read as under:

7.9(a) Supplies from DTA to SEZ units shall be eligible for the following:

(I) DTA supplier shall be entitled for: -

(i) Relevant entitlements under paragraph 8.3 of the policy.

(ii) Discharge of export performance, if any, on the supplier;

(iii) Benefit of DEPB in lieu of Drawback for supplies made to SEZ or unit in SEZ.

This issues in public interest."

(emphasis supplied)

3. It is clear from the above that by the aforesaid Notification, the EXIM Policy was amended. One of the amendments, as can be noticed, was that benefit of Duty Entitlement Pass Book (DEPB) in lieu of Drawback for supplies made to Special Economic Zone (SEZ) or unit in SEZ were also to be given which means that whenever supplies from Domestic Tariff Area (DTA) to SEZ units were to be made under the EXIM Policy, these were to be treated as exports and entitled to Drawback under the EXIM Policy. However, what was stipulated by the said Notification was that the concerned person making such ''exports'' can avail the benefit of DEPB in lieu of Drawback.

4. In order to allow the aforesaid benefit of DEPB in lieu of drawbacks, the Customs Department issued Circular No. 25/2003 dated 01.04.2003. This circular laid down the procedure that has to be followed for availing the benefits. Paragraph 2.5 thereof, detailing such a procedure, reads as under: -

"2.5 Duty Entitlement Pass Book (DEPB) Scheme

DEPB Scheme announced in 2002-07 EXIM Policy has been continued. In this regard earlier Customs Notification No. 45/2002-Cus. dated 22.4.2002 and DOR Circular No. 24/2002-Cus. dated 6.5.2002 refers. Henceforth, supplies made by DTA units to units in SEZ would be entitled for DEPB benefits. The area of the Special Economic Zone shall be a Customs Station and all the functions relating to the enforcement of the Customs Act shall be controlled by the Commissioner of Customs with the assistance of proper officers of Customs. The goods entered into the SEZ from the DTA shall be under the cover of a Bill of Export. This Bill shall be registered in the SEZ Customs formation and assigned a running serial number. Thereafter the goods shall be examined by the Customs Officers posted in the SEZ like a normal export consignment. These goods shall be eligible for DEPB benefit and the DEPB scrips shall be issued by the licensing authority to the SEZ Unit receiving supplies from DTA Unit on the basis of a disclaimer certificate given by the DTA Unit in favour of SEZ Unit. This is because it has now been decided to treat supplies made by DTA Unit to a unit in SEZ as exports for the purpose of granting DEPB benefit."

(emphasis supplied)

5. The appellant herein made certain supplies from DTA to SEZ units and, therefore, fulfilled the conditions laid down in Notification No. 17/2002-2007 dated 07.11.2002 to claim benefits thereunder as, as per the aforesaid notification, these were to be treated as exports. These supplies were admittedly made after 05.06.2002 but before 01.04.2003. The appellant claimed benefit of DEPB in lieu of drawback for those supplies by application dated 26.05.2003. The request was, however, turned down on the ground that Circular No. 25/2003 came into effect only from 01.04.2003 and, therefore, the exports made before the said date were not eligible for DEPB benefits. The submission of the appellant herein that it became entitled to these benefits by virtue of the Notification dated 05.06.2002 was not accepted. This order rejecting the entitlement of the appellant was challenged by the appellant by filing the aforesaid writ petition before the High Court. The High Court also agreed with the view of the respondent-Government holding that the benefit would enure only when Circular dated 01.04.2003 was issued and, therefore, the exports made prior to that period would not be eligible for such a benefit of DEPB. In arriving at this conclusion, the High Court has held that since there was no procedure prescribed prior to the issuance of the circular which came into force from 01.04.2003, the intention was to give the benefit to the exporters from financial year starting from 01.04.2003 and, therefore, corresponding notification was issued only w.e.f. 01.04.2003. The aforesaid reasons given by the High Court are clearly flawed and not in accordance with law.

6. We have already reproduced the language of Notification dated 05.06.2002. It categorically uses the expression that the Central Government hereby amends/ corrects the Export and Import Policy 2002-2007. It is, thus, very clear that insofar as the amendment is concerned, that was made effective by the issuance of this notification. Further, as is clear from the said notification, it was issued in exercise of the powers conferred upon the Central Government by Section 5 of the Act. It is, thus, a statutory notification whereby the EXIM Policy 2002-2007 was amended. With the issuance of such a notification, amendment came into effect from the date of issuance of the notification, i.e., 05.06.2002 and this

notification, inter alia, made the exporters who make supplies from DTA to SEZ eligible to claim benefit of DEPB in lieu of drawback for supplies made to SEZ or unit in SEZ. Insofar as the circular dated 01.04.2003 is concerned, it is only administrative in nature. It prescribed the procedure/requirements that were to be fulfilled for claiming the benefit of DEPB in lieu of drawback. By administrative circular, notification dated 05.06.2002 which was passed under Section 5 of the Act, could not be altered as that would amount to amendment of the notification and it was not within the powers of the Customs Authorities to alter the said date. Moreover, as mentioned above, this is only a procedural circular which stipulates the conditions/ procedure that had to be followed for claiming the benefit of DEPB.

7. No doubt, the respondent-authorities could, insofar as this procedure is concerned, put conditions for claiming the benefit of DEPB for the period in question but could not say that the exporters would not be entitled to such a benefit from 05.06.2002 but would be entitled only from 01.04.2003.

8. We, thus, allow this appeal and set aside the order passed by the High Court as well as the impugned order passed by the respondents and hold that the appellant shall be entitled to the benefit of DEPB benefit in lieu of drawback as claimed by him. The application of the appellant shall be proceeded with within a period of two months from today and the benefit under the said circular subject to the fulfillment of the required conditions, shall be accorded.