(2014) 11 MP CK 0001

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2576 of 2012

Suraj Impex (India) Pvt. Ltd. APPELLANT

Vs

Secretary, Union of India RESPONDENT

Date of Decision : 17-11-2014

Acts Referred:

Citation : (2017) 347 ELT 252

Hon'ble Judges : P.K. Jaiswal and D.K. Paliwal, JJ.

Bench : Division Bench

Advocate : Shri A.M. Mathur, learned Senior counsel with Shri Ashutosh Upadhayay, learned counsel, for the Petitioner; Shri Prasana Prasad, learned counsel and Shri Abhishek Tugnawat, as Parihar, for the Respondent

Final Decision : Dismissed

Judgement

1. They are heard.

2. By this writ petition under Article 226/227 of the Constitution of India, the petitioner is praying for the following relief :-

(i) Allow this petition with costs; and

(ii) By a suitable writ, direction or order it may be declared that Circular No. 35/2010-Cus., dated 17-9-2010 has retrospective effect.

(iii) Grant such other relief which this Hon''ble Court deems fit in the facts and circumstances of the case in favour of the petitioners.

3. Brief facts of the case are that the petitioner is engaged in merchant export of Soyabean Meal falling under Chapter 23 (hereinafter referred to as ''SBM'') on which they are entitled to claim duty drawback at the All Industry Rate (for short ''AIR'') introduced by Customs Notification No. 81/2006-Cus., dated 13-7-2006 and continued vide yearly customs Notification No. 68/2007, dated 16-7-2007; No. 103/2008, dated 29-8-2008 and No. 84/2010, dated 17-9-2010. According to Clause 5 of the Notification Nos. 81/2006 and 68/2007 as well as Clause 6 of

Notification No. 103/2008, the petitioner has been entitled to 1% AIR duty drawback towards customs component since the drawback rate is 1% whether Cenvat has been availed or not. During 2008-09 the respondent No. 4 formed a view that according to Clause 7(e) and (f) of Notification No. 81/2006 and 68/2007 and Clause 8(e) and (f) of Notification No. 103/2008, the petitioner was not entitled to the said AIR drawback towards customs portion if the manufacturers had availed rebate of Central Excise duty under Rule 18 or procured excise duty free inputs under Rule 19(2) of the Central Excise Rules, 2002. The respondent No. 3 at the instance of respondent No. 4 withheld release of AIR drawback to SBM exporters. The petitioners and other exporters as well as industry associations represented the matter to the Directorate of Drawback as well as Central Board of Excise and Customs, New Delhi stating that Drawback on SBM export was towards customs portion and benefit under Rule 18 or 19(2) of Central Excise Rules, 2002 was towards Central Excise portion therefore, there cannot be any reason to withhold Customs drawback if the manufacturers had claimed rebate of Central Excise duty or procured Central Excise duty free inputs.

4. The respondent No. 2 vide Custom Circular No. 35/2010, dated 17-9-2010, while issuing yearly Customs Notification No. 84/2010 of even date, clarified that both the benefits i.e., AIR drawback @ 1% and the benefit of Rule 18 or 19(2) of the Central Excise Rules, 2002 are simultaneously available. The respondent No. 3 commenced releasing AIR drawback on SBM exports for the period after 17-9-2010 but continued to withhold AIR drawback for the earlier period.

5. The question involved in this writ petition is whether the Circular No. 35/2010, dated 17-9-2010 is prospective or retrospective in nature (a) when the language used in earlier Notification No. 81/2006; 68/2007 and 103/2008 and the language used in subsequent Notification No. 84/2010 is same and (b) when the circular being a benovolent circular has prospective effect or retrospective effect.

6. The petitioners made several representations to the respondent No. 3. The respondent No. 3 vide impugned letter/dated 23-1-2012 stated that the Circular No. 35/2010-Cus., dated 17-9-2010 has not been given retrospective effect and that the said circular is effective from the date of issuance. Clause 23 of Notification No. 84/2010, dated 17-9-2010 reads as under :-

"(23) The drawback rates specified in the said Schedule against tariff items 711301 and 711302 shall not be applicable to goods manufactured or exported in discharge of export obligation against any scheme of the relevant Export and Import Policy or the Foreign Trade Policy of the Government of India which provides for duty free import/replenishment/pro-curement from local sources of gold or silver.

2. All claims for duty drawback shall be filed with reference to the tariff items and descriptions of goods shown in columns 1 and 2 of the said Schedule respectively.

3. This notification shall come into force on the 20th day of September, 2010."

7. The respondent No. 1 by communication dated 4-1-2012 (Annexure P/20) intimated that since the words of the Notification No. 84/2010, dated 17-9-2010 are clear and have prospective effect and turn down the request for apply the same retrospectively. Clause 2 to 5 of communication dated 4-1-2012 reads as under :-

"2. Para 2 of your letter quotes a line from the Circular No. 35/2010-Cus., dated 17-9-2010 and refers that as a clarification of the Board. A plain reading of the Circular shows that what has been quoted is the reference from the exporters, not the Board''s clarification.

3. Vide Condition No. 8(3) & (f) of Notification No. 103/2008-Customs (N.T), dated 29-8-2008 which notified the earlier Drawback Schedule of 2008-09, the rates of drawback specified in the Schedule were not applicable to export of a commodity or product which is manufactured or exported by availing the rebate of duty paid on materials used in the manufacture or processing of such commodity or product in terms of Rule 18 of the Central Excise Rules, 2002 or manufactured or exported in terms of sub-rule (2) of Rule 19 of the Central Excise Rules, 2002.

4. The said notification was superseded by Notification No. 84/2010-Customs (N.T.), dated 17-9-2010, effective from 20-9-2010, with a revised Drawback Schedule. The condition No. 9 of Notification No. 84/2010-Customs (N.T.) provided that the rates and caps of drawback specified in columns (4) and (5) of the schedule would not apply to export of a commodity or product which is manufactured or exported by availing the rebate of duty paid on materials used in the manufacture or processing of such commodity or product in terms of Rule 18 of the Central Excise Rules, 2002 or manufactured or exported in terms of sub-rule (2) of Rule 19 of the Central Excise Rules, 2002. Therefore, effective 20-9-2010, the rates and caps under column (6) and (7) of the Schedule became available for such exports. Through Para 4(VI)(d) of Board''s Circular No. 35/2010-Cus., dated 17-9-2010 this aspect was informed.

5. Since the words of the Notification No. 84/2010-Customs (N.T.), dated 17-9-2010 are clear and have prospective effect, the request for applying the same retrospectively does not arise."

8. The present petition raises the dispute regarding release of AIR drawback of export of SBM for the period prior to 17-9-2010. The contention of the learned Senior counsel for the petitioner is that Circular Nos. 81/2006, dated 3-7-2006, 68/2007, dated 16-7-2007; No. 103/2008, dated 29-8-2008 and No. 84/2010, dated 17-9-2010, do not make any material change in the legal provisions as far as it relates to availment of drawback of customs component even where the manufacturer/exporter had availed the benefits of Rule 18 or 19(2) of the Central Excise Rules, 2002, as existed prior to issuance of the same. The Notification No. 84/2010 merely clarify the position and make the issue explicit which was implicit in the earlier notification. He submitted that it is a settled position of law

that such clarificatory circulars and notifications would apply equally to any law/ notifications issued earlier if the provisions are identical. According to the learned Senior counsel, Notification No. 84/2010 merely clarify the position and make the issue explicit which was implicit in the earlier notifications. The respondent No. 1 vide communication dated 4-1-2012 wrongly stated that the same would be applicable prospectively and submits that writ of mandamus be issued directing the authorities that Circular No. 35/2010-Cus., dated 17-9-2010 has retrospective effect.

9. Per contra, Shri Prasana Prasad, learned counsel for the respondents has submitted that legal position is well settled that the question of giving retrospective effect to any statute does not arise when its effective date is categorically mentioned therein. He submitted that the Notification dated 17-9-2010 very categorically mentioned that the rates of drawback have been made effective from 20-9-2010. He submitted that at Serial No. 3 which has quoted herein above in the preceding paragraph, it is very clearly mentioned that Notification dated 17-9-2010 shall come into force on 20th day of September, 2010. He also drew our attention to sub-rule (2) of Rule 5 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995 :

Rule 5. Determination of date from which the amount or rate of drawback is to come into force and the effective date for application of amount or rate of drawback. -

(1) The Central Government may specify the period upto which any amount or rate of drawback determined under Rule 3 or revised under Rule 4, as the case may be, shall be in force.

(2) where the amount or rate of drawback is allowed with respective effect, such amount or rate shall be allowed from such date as may be specified by the Central Government by notification in the official Gazette which shall not be earlier than the date of changes in the rates of duty on inputs or tax on input services used in the export goods.

10. To buttress his arguments, he drew our attention to the full bench decision of the M.P. High Court in the case of Laxminarayan v. Shiv Gujar & Ors., 2003 (1) MPLJ 10 / (LPA No. 641/2000) wherein the full bench has held the following :-

"We have quoted both the provisions in juxtaposition to comprehend the scenario and further to sensitize ourselves to the controversy in issue. It is well settled proposition of law that enactments dealing with substantive right are primarily prospective unless it is expressly or by necessary implication given retrospectively. The aforesaid principle has full play when vested rights are affected or influenced. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. It is significant to allude to the facet that routinely or conventionally retrospective operation of law is not to be easily deduced Hypothesization in that regard is ordinarily unwarranted."

with the aforesaid, he prays for dismissal of the writ petition.

11. The respondents denied that the petitioner was entitled for duty drawback on SBM in terms of Clause 5 of Notification No. 81/2006 and 68/2007 as well as Clause 6 of Notification No. 103/2008.

12. As per Condition No. 7(f) of Notification No. 81/2006 the rates of drawback specified in the said Schedule shall not be applicable to export of the commodity or product if such commodity or product is manufactured or exported in terms of sub-rule (2) of Rule 19 of the Central Excise Rules, 2002. Condition No. 7(f) of Notification No. 81/2006 reads as under :-

(7) 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 -

(f) manufactured or exported in terms of sub-rule (2) of Rule 19 of the Central Excise Rules, 2002;

13. From the aforesaid, it is clear that the notification denies the drawback of the entire schedule (whether Excise or Customs components), if the facility of Rule 19(2) of the Central Excise Rules, 2002 is availed. The said conditions are the prime requirement to get the commodity eligible for the drawback. In the case in hand, the Condition No. 7(f) debar the goods from the purview of the drawback if the said goods manufactured or exported availing facility of Rule 19(2) of Central Excise Rules, the drawback was not admissible to the said goods (SBM/DOC) manufactured availing facility of Rule 19(2) of Hexane and/or other materials procured duty free by them and used the same in the manufacture of DOC/SBM.

14. As per reply the stand of the respondent that Clause 5 of Notification Nos. 81/2006 and 68/2007 and Clause 6 of Notification No. 103/2008 and 84/2010 are not applicable in the case of petitioner as the petitioner was not working under Cenvat scheme as their final product was exempted from payment of duty. On the contrary the Clause 7(f) of Notification Nos. 81/2006 and 68/2007 and Clause 8 of Notification No. 103/2008 were applicable in their case as the benefit of Rule 19(2) of the Central Excise Rules, 2002 was availed for the manufacture of goods exported by the petitioner. Since the petitioner was well aware about non-availability of drawback to him it had fully given the false declaration at the port that the export goods have been manufactured without availing benefit of the said Rule 19(2) and thereby fraudulently availed the drawback of more than Rs. 11 crores. It is also stated that the contention of the petitioner that there drawback was withheld, is incorrect as the said drawback was not legally admissible. The simultaneous availment of drawback as well as Rule 19(2) was introduced by the respondent No. 2 by omission of Clause 8(f) of erstwhile Notification No. 103/2008 and the introduction of new Clause 9(b) in Notification No. 84/2010 which was made effective from 20-9-2010 and explained the same in Circular No. 35/2010. Since the Notification No. 84/2010 was effective from 20-9-2010 and the same cannot be given retrospective effect in light of the aforementioned facts.

15. The Apex Court in the case of Commissioner of Central Excise, Chandigarh-I v. Mahaan Dairies reported as 2004 (166) E.L.T. 23 (S.C.) have held as under :

"It is settled law that in order to claim benefit of a Notification a party must strictly comply with the terms of the Notification. If on wordings of the Notification the benefit is not available then by stretching the words of the Notification or by adding words to the Notification benefit cannot be conferred."

16. The Apex Court in the case of Commissioner of Central Excise & Customs, Indore v. Parenteral Drugs (I) Ltd., 2009 (236) E.L.T. 625 (S.C.) has observed in Para 8 the following which reads as under :-

"8. We may add that exemption notifications have to be read strictly. We may also add that the burden is on the assessee to prove that the item falls within the four corners of the exemption notification."

17. The Apex Court in the case of Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal & Ors., 2011 (1) SCC 236 has held as under :-

"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

18. In the light of the above discussions, we are of the view that notification dated 17-9-2010 is not merely clarify the position and make the issue explicit, which was implicit in the earlier notification nor the same would be applicable retrospectively. The question of giving retrospective effect to Notification dated 17-9-2010, does not arise when it is very clearly mentioned therein that the same shall come into force on the 20th day of September, 2010.

19. The writ petition has no merit and is accordingly, dismissed, but without any orders as to costs.

